No. 89-1436-CFX
Status: GRANTED

Title: United States, Petitioner
v.
R. Enterprises, Inc., et al.

Docketed:
March 12, 1990

Court: United States Court of Appeals
for the Fourth Circuit

Counsel for petitioner: Solicitor General

Counsel for respondent: Treanor Jr.,Gerard F.,
Fahringer,Herald Price, Schwarz Jr.,Ralph J.

Entry	Date	Note	Proceedings and Orders
1	Mar 12 1990	G	Petition for writ of certiorari filed.
3	Apr 2 1990		Order extending time to file response to petition until May 12, 1990.
4	May 15 1990		DISTRIBUTED. May 31, 1990
5	May 17 1990	X	Brief of respondents R. Enterprises, Inc., et al. in opposition filed. VIDED.
6	May 25 1990	X	Reply brief of petitioner United States filed.
8	Jun 1 1990		REDISTRIBUTED. June 7, 1990
9	Jun 11 1990		Petition GRANTED.
			**********
10	Jun 19 1990	G	Motion of the Solicitor General to dispense with printing the joint appendix filed.
11	Jul 19 1990		Lodging received.
12	Jul 19 1990		Brief of petitioner United States filed.
16	Jul 27 1990	D	Motion of respondents for divided argument filed.
14	Aug 13 1990		Order extending time to file brief of respondent on the merits until August 31, 1990.
15	Aug 20 1990		Record filed.
		*	Certified record, one box, 12 volumes, received.
17	Aug 30 1990		Motion of the Solicitor General to dispense with printing the joint appendix GRANTED.
18	Aug 30 1990		Motion of respondents for divided argument DENIED.
19	Aug 31 1990		Brief amicus curiae of PHE, Inc. filed.
20	Aug 31 1990		Brief of respondents R. Enterprises, Inc., et al filed.
21	Sep 19 1990		CIRCULATED.
23	Sep 25 1990	X	Reply brief of petitioner United States filed.
22	Sep 26 1990		SET FOR ARGUMENT MONDAY, OCTOBER 29, 1990. (4TH CASE)
24	Sep 26 1990		SET FOR ARGUMENT MONDAY, OCTOBER 29, 1990. (4TH CASE)
25	Oct 17 1990	X	Appendix of petitioner United States filed.
26	Oct 29 1990		ARGUED.

89- 1486

No.

In the Supreme Court of the United States

OCTOBER TERM, 1989

UNITED STATES OF AMERICA, PETITIONER

v.

R. ENTERPRISES, INC., AND MFR COURT STREET BOOKS, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

KENNETH W. STARR
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QUESTION PRESENTED

Whether, before it may enforce compliance with a grand jury subpoena for corporate business records, the government must establish that the subpoenaed materials would be relevant and admissible at a trial on the merits.

PARTIES TO THE PROCEEDING

In addition to the named parties, Model Magazine Distributors, Inc., was a party in the courts below.

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In the Supreme Court of the United States

OCTOBER TERM, 1989

No.

UNITED STATES OF AMERICA, PETITIONER

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-15a) is reported at 884 F.2d 772. Earlier opinions of the court of appeals (App., *infra*, 16a-18a, and 19a-56a) are reported, respectively, at 844 F.2d 202 and 829 F.2d 1291.

JURISDICTION

The judgment of the court of appeals was entered on August 31, 1989. A petition for rehearing was denied on December 12, 1989 (App., *infra*, 68a-69a).

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

RULE INVOLVED

Rule 17 of the Federal Rules of Criminal Procedure provides, in pertinent part, as follows:

> (c) **For Production of Documentary Evidence and of Objects.** A subpoena may also command the person to whom it is directed to produce the books, papers, documents or other objects designated therein. The court on motion made promptly may quash or modify the subpoena if compliance would be unreasonable or oppressive. The court may direct that books, papers, documents or objects designated in the subpoena be produced before the court at a time prior to the trial or prior to the time when they are to be offered in evidence and may upon their production permit the books, papers, documents or objects or portions thereof to be inspected by the parties and their attorneys.

STATEMENT

1. Since 1986, a grand jury sitting in the Eastern District of Virginia has been investigating allegations of interstate transportation of obscene materials. In early 1988, the grand jury issued a series of subpoenas to Model Magazine Distributors, Inc. (Model), and two related companies, respondents R. Enterprises, Inc., and MFR Court Street Books, Inc. (MFR).[1] The subpoenas sought a variety of corporate books and records. See App., *infra*, 70a-82a. The grand jury subsequently issued two further subpoenas to Model. The first called for additional business records; the second requested one copy of each of 193 identified videotapes that Model had shipped into the Eastern District of Virginia. *Id.* at 83a-84a; see *id.* at 4a.

[1] The government had earlier sought to subpoena certain corporate records and videotapes in the possession of Model and another company, but the court of appeals had held those subpoenas to be too broad and too vague, and had refused to compel compliance with the subpoenas. See App., *infra*, 19a-56a.

2. Respondents moved to quash the subpoenas. Following extensive hearings in the United States District Court for the Eastern District of Virginia, the motions to quash were denied.

First, on June 17, 1988, Judge Hilton denied Model's motions to quash. App., *infra*, 57a-58a. The court found that the two subpoenas for business records were sufficiently specific. *Ibid.* It also upheld the subpoena for the 193 videotapes, concluding that the tapes were relevant to the government's investigation and that production of the tapes would not constitute a prior restraint. *Ibid.*

Second, on July 8, 1988, Judge Cacheris denied the motion by R. Enterprises to quash the subpoena for business records. App., *infra*, 59a-60a. The court found that the subpoena was "clearly delineated and not overly burdensome." *Id.* at 59a. The court also found a "sufficient connection" between R. Enterprises and the Eastern District of Virginia to warrant "further investigation by the grand jury." *Id.* at 60a. In particular, the court noted that Martin Rothstein, the owner of R. Enterprises, had admitted that R. Enterprises, MFR Books, and Model were "all the same thing." *Ibid.*

Finally, on August 12, 1988, Judge Ellis denied MFR's motion to quash the subpoena for business records. App., *infra*, 61a-64a. The court stated that it was "inclined to agree" with "the majority of the

jurisdictions," which do not require the government to make "a threshold showing" before a grand jury subpoena may be enforced. *Id.* at 63a. The court added, however, that "even assuming that the Fourth Circuit would require a threshold showing of relevance," the government had made such a showing in this case. *Ibid.* The court found sufficient evidence that respondents were "related entities," at least one of which "certainly did ship sexually explicit material into the Commonwealth of Virginia." *Ibid.* The court also found the subpoena to be appropriately "tailored." *Ibid.* Characterizing the subpoenas in this case as "fairly standard business subpoenas," which "ought to be complied with," *id.* at 65a, the district court denied the motion to quash. When the companies thereafter refused to comply, the court found them in contempt. *Id.* at 64a.

3. The court of appeals affirmed in part and reversed in part. App., *infra*, 1a-15a. Relying on *United States* v. *Nixon*, 418 U.S. 683 (1974), the court held that, pursuant to Rule 17(c) of the Federal Rules of Criminal Procedure, the government must "clear three hurdles" in order to secure the enforcement of a grand jury subpoena: "(1) relevancy; (2) admissibility; (3) specificity" (App., *infra*, 7a).[2] The court emphasized that unless grand jury subpoenas are held to such a threshold standard, they might be used as "a means of discovery in addition to that provided by Fed. R. Crim. Pro. 16." App., *infra*, 9a. "The test for enforcement," the

[2] The court of appeals "recognize[d] that the *Nixon* court was not reviewing a subpoena duces tecum in connection with a grand jury investigation," but it found the "interpretation of Rule 17(c)" articulated in the *Nixon* case "equally applicable in this case." App., *infra*, 7a n.2.

court explained, "is whether the subpoena constitutes 'a good faith effort to obtain identified evidence rather than a general "fishing expedition" that attempts to use the rule as a discovery device.'" *Ibid.* In order not to "undercut[] the strict limitation of discovery in criminal cases" (*ibid.*), the court held that "any documents subpoenaed under Rule 17(c) must be admissible as evidence at trial." *Id.* at 10a.

Applying those standards, the court first upheld the subpoenas to Model for business records. App., *infra*, 7a-8a. It found the requested records to be sufficiently relevant because they would "most likely reveal whether the company's business dealings in Virginia resulted in the sale and or distribution of allegedly obscene materials in the state." *Id.* at 8a. In addition, the court had no doubt of "the necessity of a subpoena to obtain those records, as logically they are available only from the company itself." *Ibid.*

The court, however, quashed the subpoenas for the business records of MFR and R. Enterprises. App., *infra*, 8a-10a. The court explained that the government had adduced no evidence that those companies had done business in the Eastern District of Virginia; the court therefore "fail[ed] to see how the records of those companies are relevant to a grand jury investigation" in the district. *Id.* at 9a. In addition, the court stated, any evidence of activities by the target companies outside the State of Virginia "would most likely be inadmissible on relevancy grounds at any trial that might occur." *Id.* at 10a. Accordingly, the court held, the subpoenas "fail to meet the requirement[] that any documents subpoenaed under Rule 17(c) must be admissible as evidence at trial." *Ibid.*

Finally, the court remanded Model's motion to quash the subpoena for videotapes. App., *infra*, 10a-15a. The court held that the subpoenaed films were not shown to be obscene and that the government had failed to establish the relevance of the films to the grand jury's investigation. *Id.* at 12a-14a & n.4. It also noted that there were "additional means for obtaining these tapes other than the issuance of a subpoena duces tecum and an *in camera* review by the district court." *Id.* at 13a.

On December 12, 1989, the panel denied the government's petition for rehearing. By a vote of 6 to 5, the full court of appeals denied rehearing en banc. App., *infra*, 68a-69a.

REASONS FOR GRANTING THE PETITION

Rule 17(c) of the Federal Rules of Criminal Procedure permits the recipient of a grand jury subpoena duces tecum to move to quash the subpoena on the ground that "compliance would be unreasonable or oppressive." Relying on Rule 17(c), the court of appeals agreed to quash two grand jury subpoenas for garden-variety business records because, in the court's view, the subpoenas did not "meet the requirement[] that any documents subpoenaed under Rule 17(c) must be admissible as evidence at trial." App., *infra*, 10a.[3]

The court of appeals' decision is both unprecedented and unwise. The majority of circuits do not

[3] The court of appeals also vacated an order requiring compliance with the subpoena for videotapes. App., *infra*, 10a-15a. Although we disagree with that portion of the court's decision as well, we seek review only of that portion of the decision quashing the subpoenas for respondents' business records.

require the government to make *any* preliminary showing of relevance in order to secure compliance with a grand jury subpoena. And while two circuits have imposed a modest threshold requirement, no other circuit has gone as far as the Fourth Circuit, which has construed Rule 17(c) to require the government to make a threshold showing that evidence sought by the grand jury would be relevant and admissible at a trial on the merits. Because the court of appeals' novel standard for grand jury subpoenas is inconsistent with the decisions of this Court, conflicts with the approach taken by the majority of other circuits, and threatens to disrupt the ordinary operation of grand jury investigations, the petition for a writ of certiorari should be granted.

1. a. This Court has consistently recognized the broad scope of a grand jury's powers of investigation. "Because its task is to inquire into the existence of possible criminal conduct and to return only well-founded indictments," a grand jury's "investigative powers are necessarily broad." *Branzburg* v. *Hayes*, 408 U.S. 665, 688 (1972). While the powers of the grand jury are not unlimited, "the longstanding principle that 'the public . . . has a right to every man's evidence,' except for those persons protected by a constitutional, common-law, or statutory privilege, * * * is particularly applicable to grand jury proceedings." *Ibid.* Accord *United States* v. *Dionisio*, 410 U.S. 1, 9-10 (1973).

Over the years, the Court has articulated three related principles designed to ensure that the grand jury can fulfill its broad investigative and accusatory mandate.

First, the Court has held that the rules and restrictions that apply at trial on the merits do not

apply in the same way to grand jury proceedings. Because it has "[t]raditionally * * * been accorded wide latitude to inquire into violations of criminal law," the grand jury "may compel the production of evidence or the testimony of witnesses as it considers appropriate, and its operation generally is unrestrained by the technical procedural and evidentiary rules governing the conduct of criminal trials." *United States* v. *Calandra*, 414 U.S. 338, 343 (1974). Unlike the trial on the merits, "[a] grand jury proceeding is not an adversary hearing in which the guilt or innocence of the accused is adjudicated." *Ibid.*

For example, in *Calandra* the Court held the Fourth Amendment exclusionary rule inapplicable to grand jury proceedings. "Permitting witnesses to invoke the exclusionary rule before a grand jury would precipitate adjudication of issues hitherto reserved for the trial on the merits and would delay and disrupt grand jury proceedings." 414 U.S. at 349. Moreover, the Court emphasized, "[s]uppression hearings would halt the orderly progress of an investigation and might necessitate extended litigation of issues only tangentially related to the grand jury's primary objective." *Ibid.*

Similarly, in *Costello* v. *United States*, 350 U.S. 359 (1956), the Court refused to apply the rule against hearsay to grand jury proceedings. The American grand jury system, observed the Court, derives from the English model, under which the work of the grand jury "was not hampered by rigid procedural or evidential rules." *Id.* at 362. Indeed, the Court noted, grand jurors "could act on their own knowledge and were free to make their presentments or indictments on such information as they deemed satisfactory." *Ibid.* To impose the rule against hear-

say on the grand jury process, the Court explained, "would run counter to the whole history of the grand jury institution, in which laymen conduct their inquiries unfettered by technical rules." *Id.* at 364. The Court sharply distinguished the rules that apply in the grand jury from those that apply at trial: "In a trial on the merits, defendants are entitled to a strict observance of all the rules designed to bring about a fair verdict. Defendants are not entitled, however, to a rule which would result in interminable delay but add nothing to the assurance of a fair trial." *Ibid.*

Second, the Court has emphasized that the rules applicable to grand jury proceedings must take into account the fact that "[a] grand jury investigation 'is not fully carried out until every available clue has been run down and all witnesses examined in every proper way to find if a crime has been committed.'" *Branzburg* v. *Hayes*, 408 U.S. at 701. "[T]he precise nature of the offense, if there be one," the Court has stated, is "developed at the conclusion of the grand jury's labors, not at the beginning." *Blair* v. *United States*, 250 U.S. 273, 282 (1919). Applying that principle, the Court has consistently held that the scope of the grand jury's inquiries cannot be confined by rules that depend, in any respect, on the outcome of the grand jury's efforts.

For example, in *Hale* v. *Henkel*, 201 U.S. 43 (1906), the Court rejected the contention that a witness may not be questioned prior to the return of an indictment. The Court explained that "[i]t is impossible to conceive that * * * the examination of witnesses must be stopped until a basis is laid by an indictment formally preferred, when the very object of the examination is to ascertain who shall be in-

dicted." *Id.* at 65. Accord *United States* v. *Dionisio*, 410 U.S. at 16.

More recently, in *Branzburg* v. *Hayes*, *supra*, the Court rejected the contention that before a grand jury may subpoena a reporter for his source of information, the government must show that a crime has occurred and that the information is not available elsewhere. The Court explained that "only the grand jury itself can make this determination," in that the grand jury's role "includes an investigatory function with respect to determining whether a crime has been committed and who committed it." 408 U.S. at 701. "It is only after the grand jury has examined the evidence that a determination of whether the proceeding will result in an indictment can be made." *Id.* at 701-702. As the Court summarized the point in *Blair* v. *United States*, 250 U.S. at 282, the scope of a grand jury investigation "is not to be limited narrowly by questions of propriety or forecasts of the probable result of the investigation, or by doubts whether any particular individual will be found properly subject to an accusation of crime."

Third, the Court has emphasized that, in order to discharge its functions, the grand jury should not be interrupted by procedural detours. "Any holding that would saddle a grand jury with minitrials and preliminary showings would assuredly impede its investigation and frustrate the public's interest in the fair and expeditious administration of the criminal laws." *United States* v. *Dionisio*, 410 U.S. at 17. Accord *United States* v. *Calandra*, 414 U.S. at 350. As the Court explained in *Costello*, if a grand jury's work could be challenged on the grounds of adequacy or competence, "the resulting delay would be great indeed. The result of such a rule would be that be-

fore trial on the merits a defendant could always insist on a kind of preliminary trial to determine the competency and adequacy of the evidence before the grand jury." 350 U.S. at 363.

b. The court of appeals' decision violates each of those three principles. First and foremost, the decision holds the grand jury to the same standards of relevance and admissibility that apply at trial. In the court's view, "any documents subpoenaed under Rule 17(c)"—whether subpoenaed by a grand jury during its investigation, or subpoenaed by the government after indictment and in preparation for trial—"must be admissible as evidence at trial" (App, *infra*, 10a). Applying that standard, the court quashed the subpoenas to R. Enterprises and MFR, concluding that evidence of activities outside of Virginia "would most likely be inadmissible on relevancy grounds at any trial that might occur." *Ibid.* This was wrong: that standard ignores this Court's consistent distinction between the grand jury and trial settings and imposes on the grand jury process a rule of relevance that simply has no place in the investigative context.[4]

Second, the relevance standard adopted by the court of appeals depends, in principal part, on the outcome of the grand jury's business—who will be

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[4] The court of appeals also made some rather doubtful assessments of relevance even under a trial standard. For example, the court surmised that out-of-state transactions conducted by Martin Rothstein through two of the corporate entities would not be admissible against him in a trial conducted in the Eastern District of Virginia. See App., *infra*, 10a. Under Fed. R. Evid. 404(b), however, that narrow construction of relevance seems problematic at best. Still less does such a restrictive view of relevance apply at the grand jury stage.

charged as defendants, and what the charges will be. Such a standard is entirely inconsistent with the principle that the grand jury's work cannot be confined by "forecasts of the probable result of the investigation, or by doubts whether any particular individual will be found properly subject to an accusation of crime." *Blair* v. *United States*, 250 U.S. at 282. As this Court has noted, the grand jury "does not depend on a case or controversy for power to get evidence but can investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not." *United States* v. *Morton Salt Co.*, 338 U.S. 632, 642-643 (1950). Under the court of appeals' approach, however, a grand jury may subpoena only evidence that can be shown to be relevant to the charges that the grand jury will ultimately announce.

Finally, by affording targets a ready vehicle for challenging subpoenas—one that requires the government to show relevance and admissibility—the court of appeals has created a new means for delaying grand jury investigations. Targets of a grand jury investigation ordinarily have every incentive to defeat or at least delay the investigation, as well as to obtain information about the government's case. Indeed, trial practice guides for defense counsel specifically refer to numerous tactical advantages of such pretrial motions.[5] This Court's cases, however, strongly counsel against measures that would permit

[5] See, *e.g.*, 1 A. Amsterdam, *Trial Manual for the Defense of Criminal Cases* § 172 (1984); 1. S. Allen, I. Rosen, D. Winston & J. Kruskal, *Criminal Defense Techniques* § 6A.02[5] (1988); B. Gershman, *Prosecutorial Misconduct* §§ 2.1-2.9 (1985); National Lawyers Guild, *Representation of Witnesses Before Federal Grand Juries* § 13.4(b) (3d ed. 1985).

such "undue interruption [of] the inquiry instituted by a grand jury." *Cobbledick* v. *United States*, 309 U.S. 323, 327 (1940).

2. There are two lines of authority within the circuit courts concerning motions to quash subpoenas duces tecum under Rule 17(c). In most circuits, the government need not make *any* preliminary showing of relevance—let alone a showing that the materials would be relevant at trial. Rather, under the majority rule, the initial burden falls on the recipient of the subpoena, which can obtain relief only if it can establish that the requested documents have no conceivable relevance to the subject of the grand jury's investigation. Two circuits, however, have required the government to make a preliminary showing that the subpoenaed records are relevant to a legitimate grand jury investigation. Although the Fourth Circuit's decision in the present case has features in common with the minority rule, it goes well beyond even that rule by requiring the government to establish the likely relevance of the subpoenaed documents at trial.

a. The majority rule is well settled. In *In re Grand Jury Subpoena* (*Battle*), 748 F.2d 327 (1984), for example, the Sixth Circuit refused to quash a grand jury subpoena seeking "all books, papers, records, memoranda and data" relating to certain discretionary bank accounts controlled by a former union official. The court rejected the official's contention that the government should be required to demonstrate the relevance of the requested records. Instead, the court explained, "[t]he burden is on the party seeking to quash the subpoena to show 'that the information sought bears "no conceivable relevance to any legitimate object of investigation by the federal grand

jury," * * * or that there has been 'harassment or prosecutorial misuse of the system.'" *Id.* at 330.

The Eleventh Circuit has likewise declined to require the government to make a preliminary showing of relevance in order to enforce a grand jury subpoena duces tecum. In *In re Grand Jury Proceedings (Bank of Nova Scotia)*, 691 F.2d 1384 (1982), cert. denied, 462 U.S. 1119 (1983), the recipient of a documents subpoena resisted production, contending that the government should first be required to show "that the documents sought are relevant to an investigation properly within the grand jury's jurisdiction and not sought primarily for another purpose." *Id.* at 1387. The court of appeals rejected that claim and enforced the subpoena. Acknowledging that the trial court had made no finding "that the documents sought were relevant or necessary for the grand jury's investigation," *ibid.*, the court flatly refused to devise any such requirement "absent some showing of harassment or prosecutorial misuse of the system." *Ibid.* To do so, the court reasoned, would "impose [an] undue restriction[] upon the grand jury investigative process." *Ibid.*

The Second Circuit likewise follows the majority rule. In *In re Liberatore*, 574 F.2d 78 (1978), the recipient of a grand jury subpoena duces tecum seeking handwriting exemplars and fingerprints contended that the government should be required to show the relevance and necessity of that information to the grand jury's investigation. After noting that the target had not preserved the issue for appeal, the court went on to reject the claim on the merits. The court explained that "the government does not in each and every case bear the constant burden of initially showing the relevance of the particular evi-

dence sought to be produced by way of subpoena." *Id.* at 83. "Instead," the court continued, "the party seeking to quash a subpoena must carry the burden of showing that the information sought bears 'no conceivable relevance to any legitimate object of investigation by the federal grand jury.'" *Ibid.*

The Ninth Circuit has also refused to impose on the government the requirement to make a threshold showing of relevance or necessity. For example, in *In re Grand Jury Proceeding (Schofield)*, 721 F.2d 1221 (1983), a grand jury issued a subpoena to the former attorney of a target, seeking documents relating to the previous representation. The district court quashed the subpoena, stating that the government must first establish, by affidavit, the "legitimate need and relevance" of the requested information. *Id.* at 1222. The court of appeals reversed, holding that "[n]o affidavit of relevance and need must be introduced." *Id.* at 1223. The court explained that "[i]n view of the presumption that the government obeys the law . . . [there is] no reason to inject into routine grand jury investigations the delay and imposition upon district courts that will be opened up by a rule institutionalizing these disclaiming affidavits." *Ibid.* Accord *In re Grand Jury Proceedings (Hergenroeder)*, 555 F.2d 686 (9th Cir. 1977).

b. The Third Circuit, joined more recently by the Tenth Circuit, has long applied a somewhat different approach, requiring the government, in the first instance, to justify a subpoena duces tecum on relevance grounds. See *In re Grand Jury Proceedings (Schofield II)*, 507 F.2d 963 (3d Cir.), cert. denied, 421 U.S. 1015 (1975); *In re Grand Jury Proceedings (Schofield I)*, 486 F.2d 85, 92-93 (3d Cir. 1973); *In re Grand Jury Subpoena Duces Tecum Issued on June*

9, 1982, 697 F.2d 277, 281 (10th Cir. 1983). In *Schofield I*, the Third Circuit, exercising its "supervisory powers," required the government to make a preliminary showing, by affidavit, that each item requested by the grand jury is "at least relevant to an investigation being conducted by the grand jury and properly within its jurisdiction, and is not sought primarily for another purpose." [6] 486 F.2d at 93. The Third Circuit does not, however, require more than a minimal showing of relevance. For example, in *In re Appeal of Hughes*, 663 F.2d 282 (1980), the court found that the government had demonstrated the relevance of documents subpoenaed by the grand jury when it represented, by affidavit, that "the grand jury was conducting an investigation into specific federal crimes," that the requested documents would be relevant to that investigation, and that the information was not sought for an unrelated purpose. *Id.* at 287. The court noted that even a "cryptic" affidavit may satisfy the government's obligation under *Schofield I*. *Ibid.* See also *In re Grand Jury Proceedings (Schofield II)*, 507 F.2d at 967.

c. Like the rule in the Third and Tenth Circuits, the Fourth Circuit's decision in the present case imposes a threshold obligation on the government to establish the relevance of the subpoenaed records. But

[6] Most circuits have explicitly rejected the Third Circuit's "Schofield" rule. See *In re Grand Jury Proceedings (85 Misc. 140)*, 791 F.2d 663, 665 (8th Cir. 1986); *In re Sinadinos*, 760 F.2d 167, 169 (7th Cir. 1985); *In re Grand Jury Subpoena (Battle)*, 748 F.2d at 330 (Sixth Circuit); *In re Grand Jury Proceedings (Bank of Nova Scotia)*, 691 F.2d at 1387 (Eleventh Circuit); *In re Pantojas*, 628 F.2d 701, 704-705 (1st Cir. 1980); *In re Liberatore*, 574 F.2d at 83 (Second Circuit); *In re Grand Jury Proceedings (Hergenroeder)*, 555 F.2d at 686 (Ninth Circuit).

the decision below goes well beyond the minority rule. To satisfy the court of appeals' standard, the government must prove that the requested documents are relevant not merely to the *grand jury's investigation*, but also to the *likely charges at trial*. No other court of appeals—not even the Third and Tenth Circuits—has taken so restrictive a view of the grand jury's subpoena power.

By superimposing on the grand jury system a set of trial-related requirements, the court of appeals lost sight of the critical differences between those two distinct stages of the criminal justice system. And in the process, the court has devised a blueprint for grand jury delay and disruption—a lesson that will not be lost on future recipients of grand jury subpoenas.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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MARCH 1990

APPENDIX A

UNITED STATES COURT OF APPEALS
FOURTH CIRCUIT

Nos. 88-5619, 88-5620

IN RE GRAND JURY 87-3 SUBPOENA DUCES TECUM

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

UNDER SEAL, DEFENDANT-APPELLEE.

IN RE GRAND JURY 87-4 SUBPOENA DUCES TECUM

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

UNDER SEAL, DEFENDANT-APPELLANT

Decided Aug. 31, 1989

Before ERVIN, Chief Judge, and PHILLIPS and WILKINSON, Circuit Judges.

ERVIN, Chief Judge:

These cases concern the question of whether subpoenas duces tecum which seek the production of certain corporate records as well as video tapes presumptively protected by the first amendment meet the relevancy, admissibility, specificity and necessity requirements of Fed.Rule Crim. Pro. 17(c). We affirm

the district court's refusal to quash the subpoena issued to Model Magazine Distributors, requesting the company's corporate records. We find, however, that the government failed to demonstrate the relevance of either the corporate records requested from R. Enterprises, Inc. and MFR Court Street Books, Inc. or of the 193 named video tapes requested from Model Magazine. The government also failed to offer any evidence showing that the subpoena was a necessary tool for obtaining copies of the video tapes. For these reasons we reverse the district court's refusal to quash the subpoenas issued to R. Enterprises and MFR Court Street Books. We also remand the motion to quash the subpoena issued to Model Magazine requesting copies of the 193 video tapes, for further inquiry into both the relevancy of these tapes and the necessity of employing a subpoena duces tecum to obtain them.

I.

Factual and Procedural Background

These cases arise on a motion to stay a contempt order. The parties addressed the merits of the appeal in their briefs and oral arguments. We therefore decide the issues before us on the merits, rather than limiting our consideration to the request for a stay. Appeal of a civil contempt order is proper in this context. *See United States v. Ryan*, 402 U.S. 530, 532, 91 S.Ct. 1580, 1582, 29 L.Ed.2d 85 (1971); *Cobbledick v. United States*, 309 U.S. 323, 328, 60 S.Ct. 540, 542, 84 L.Ed. 783 (1940).

A party who chooses to subject himself to the risk of fines and imprisonment due to contempt can contest the validity of a subpoena in the role of contemner. If the subpoena is even partially bad, the contempt conviction should be reversed. *See Bowman*

Dairy Co. v. United States, 341 U.S. 214, 221, 71 S.Ct. 675, 679, 95 L.Ed. 879 (1951).

The subpoena duces tecum at issue arose out of a federal grand jury investigation in Virginia concerning the distribution of obscene materials. Subpoenas duces tecum were originally served on Model Distributors and Metro Video Distributors in October, 1986. Those subpoenas requested certain corporate records, as well as "one copy of any video tape cassette, 8 mm film or 16 mm film" that depicted specified types of conduct, which would render the films legally obscene. The subpoenas also demanded documents related to any tapes involving the listed categories of sexual activity. Both Model and Metro Video refused to comply with the subpoenas arguing that they were "unreasonable and oppressive," in violation of Fed.R.Crim.Pro. 17(c). The district court denied the companies' motions to quash the subpoenas, and found both parties in contempt.

On appeal, this court reversed the district court's findings as to reasonableness and burdensomeness under Rule 17(c), and quashed the subpoenas. *In re Grand Jury Subpoena: Subpoena Duces Tecum*, 829 F.2d 1291 (4th Cir.1987), *reh'g denied*, 844 F.2d 202 (1988) ("*Model* I"). We found that the subpoenas did not meet the requirements of Rule 17(c) because:

> The presumptively protected materials they seek are otherwise procurable, and in a less intrusive manner; the specificity of the subpoenas is illusory, since the categories described do not refer to particular tapes; as a result, the corporations before us would be required to perform burdensome searches and would be at risk for failing to fulfill vague requirements; in sum, the govern-

ment appears to be engaging in a paradigmatic "fishing expedition."

829 F.2d at 1302.

Following our decision in *Model* I, the grand jury issued new subpoenas to Model, R. Enterprises [1], and MFR Court Street Books, Inc. on April 22, 1988. All three of these corporations are owned and operated by Martin E. Rothstein. When served with the subpoenas for these three corporations, Mr. Rothstein told an FBI agent that the entities were "all the same thing, I am the president of all three."

Model partially complied with the April 22 subpoena, but refused to produce "standard" corporate books and records (i.e. the general ledger, the disbursements journal, and banking records). The company based its refusal to comply fully on the grounds that it was no longer doing business in Virginia, and that the documents were not relative to a grand jury investigation in Virginia.

On June 2, 1988, the grand jury issued two new subpoenas to Model. The first again requested specific business records, and the second sought one copy of each of the 193 video cassettes Model had shipped to retailers in the Eastern District of Virginia. The 193 titles had been disclosed in Model's invoices supplied pursuant to the 1986 subpoena.

All three companies eventually moved to quash the various subpoenas. On June 17, 1988 the district court denied Model's motion to quash the subpoena requesting the 193 video tapes. The court found the

[1] A subpoena was originally issued to Coast-to-Coast Video, rather than R. Enterprises. The grand jury subsequently issued a subpoena to R. Enterprises d/b/a Coast-to-Coast.

subpoena satisfied the specificity standards suggested in *Model* I, and that the tapes were relevant to the government's investigation. The district court also denied Model's motion to quash the business records subpoenas issued to the company, and ordered the production of those records. The court found that those subpoenas were not overbroad.

On July 8, 1988 the district court denied R. Enterprises, Inc.'s motion to quash the records subpoena issued to it. The trial judge found that the subpoena was not overbroad, and that given Rothstein's admission that the three companies were the "same thing," there existed a sufficient connection with Virginia to warrant further grand jury investigation.

On August 22, 1988 the district court ordered MFR to comply with the records subpoena issued to it. The court found that Model, MFR, and R. Enterprises were one and the same, and that there was evidence that at least one of the entities, Model, had shipped material into the Eastern District of Virginia. Therefore, the lower court reasoned, the material sought from MFR was relevant. The court also found that the subpoenas were not indefinite or burdensome, and that they did not impermissibly chill first amendment rights.

On August 18, 1988 the district court found Model, MFR, and R. Enterprises, Inc. in contempt for failure to comply with orders to produce the subpoenaed materials. The court fined each company $500.00 per day, but stayed imposition of the fines until August 22, 1988, pending appeal. This court subsequently stayed the district court's contempt order retroactive to its date of entry, pending this appeal.

II.
Rule 17(c)

The subpoenas duces tecum challenged in this case were issued pursuant to Fed.R.Crim.Pro. 17(c), which provides:

> A subpoena may also command the person to whom it is directed to produce the books, papers, documents or other objects designated therein. The court on motion made promptly may quash or modify the subpoena if compliance would be unreasonable or oppressive. The court may direct that books, papers, documents or objects designated in the subpoena be produced before the court at a time prior to the trial or prior to the time when they are to be offered in evidence and may upon their production permit [them] to be inspected by the parties and their attorneys.

In *United States v. Nixon*, 418 U.S. 683, 94 S.Ct. 3090, 41 L.Ed.2d 1039 (1974), the Supreme Court held that a subpoena issued pursuant to Rule 17(c) is not "unreasonable or oppressive" if the party seeking its enforcement can demonstrate:

> (1) that the documents are evidentiary and relevant; (2) that they are not otherwise procurable reasonably in advance of trial by exercise of due diligence; (3) that the party cannot properly prepare for trial without such production and inspection in advance of trial and that the failure to obtain such inspection may tend unreasonably to delay the trial; and (4) that the application is made in good faith and is not intended as a general "fishing expedition."

418 U.S. at 699-700, 94 S.Ct. at 3103.[2] Against this background, the court concluded, the government, "in order to carry [its] burden, must clear three hurdles: (1) relevancy; (2) admissibility; (3) specificity." 418 U.S. at 700, 94 S.Ct. at 3103.

The determination of whether a subpoena duces tecum issued under Rule 17(c) is either unreasonable or oppressive is "committed to the sound discretion of the trial court." *Nixon, supra*, at 702, 94 S.Ct. at 3105. Thus, an appellate court will not ordinarily disturb a finding that a subpoena complies with Rule 17(c) unless it determines that the trial court's finding was arbitrary, or without support in the record. *Id.*

III.
Business Records Subpoenas

Our only concern with respect to the business records requested from Model, R. Enterprises, and MFR is the relevancy of those documents to the grand jury's investigation.

A. *Model Magazine*

The grand jury is investigating the possibility that Model shipped obscene materials into, and distributed them within, the Eastern District of Virginia. Such conduct could be found to violate 18 U.S.C. § 1465 (1982)[3], which prohibits the transportation of obscene matters for sale or distribution.

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[2] We recognize that the *Nixon* court was not reviewing a subpoena duces tecum in connection with a grand jury investigation, but we find that its interpretation of Rule 17(c) is equally applicable in this case.

[3] The statute provides in relevant part:

> Whoever knowingly transports in interstate or foreign commerce for the purpose of sale or distribution any

We do not doubt the relevance of Model's business records to this investigation, as those records will most likely reveal whether the company's business dealings in Virginia resulted in the sale and or distribution of allegedly obscene materials in the state. Nor do we doubt the necessity of a subpoena to obtain those records, as logically they are available only from the company itself. We therefore affirm the district court's refusal to quash the subpoena requesting Model's corporate records.

B. *MFR and R. Enterprises*

The government does not allege, and the record contains absolutely no evidence indicating, that either MFR or R. Enterprises has ever shipped materials into, or otherwise conducted business in, the Eastern District of Virginia. The district court found that the business records of these two companies were relevant to the investigation of Model because MFR, R. Enterprises and Model are all owned by the same individual, Martin Rothstein. The lower court apparently believed that Rothstein's ownership of the three companies, in conjunction with the evidence demonstrating that Model shipped allegedly pornographic material into the Eastern District of Virginia, gives rise to an inference that MFR and R. Enterprises also transacted business in that location. In the absence of any evidence linking MFR and R.

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obscene, lewd, lascivious, or filthy book, pamphlet, picture, film, paper, letter, writing, print, silhouette, drawing, figure, image, cast, phonograph recording, electrical transcription or other article capable of producing sound or any other matter of indecent or immoral character, shall be fined not more than $5,000 or imprisoned not more than five years, or both. . . .

Enterprises with the Eastern District of Virginia, however, such an inference is arbitrary at best.

Rule 17(c) was not intended to provide a means of discovery in addition to that provided by Fed.R. Crim.Pro. 16. *See Bowman Dairy Co., supra,* 341 U.S. at 221, 71 S.Ct. at 679. In reviewing motions to quash subpoenas issued under 17(c), the federal courts have acted with great care to insure that the rule "is not turned into a broad discovery device, thereby undercutting the strict limitation of discovery in criminal cases." *United States v. Cuthbertson,* 630 F.2d 139, 146 (3d Cir.1980). The test for enforcement is whether the subpoena constitutes "a good faith effort to obtain identified evidence rather than a general 'fishing expedition' that attempts to use the rule as a discovery device." *Id.* at 144. *See also Bowman Dairy Co., supra,* 341 U.S. at 220-21, 71 S.Ct. at 678-79; *United States v. Layton,* 90 F.R.D. 514, 526 (N.D.Ca.1981).

The grand jury's request for these records appears to be premised on nothing more than a hope that the documents will reveal a tie between the companies and Virginia. "Mere hope," however, does not justify the enforcement of a subpoena under Rule 17(c). *Cuthbertson, supra,* 630 F.2d at 146. *See also Gilmore v. United States,* 256 F.2d 565, 568 (5th Cir.1958). The government must offer some evidence of a connection between MFR and R. Enterprises and Virginia before it can subpoena the companies' business records under 17(c). Because the government has offered no such evidence, we fail to see how the records of those companies are relevant to a grand jury investigation in the Eastern District of that state. In the absence of such evidence, enforcement of the subpoena would indeed allow the government to engage in a fishing

expedition, in the hopes of turning up incriminating evidence.

We also note that any evidence concerning Mr. Rothstein's alleged business activities outside of Virginia, or his ownership of companies which distribute allegedly obscene materials outside of Virginia, would most likely be inadmissible on relevancy grounds at any trial that might occur. This is true even if one views the grand jury as investigating Martin Rothstein, rather than Model Magazine. It would appear, therefore, that these subpoenas fail to meet the requirements [*sic*] that any documents subpoenaed under Rule 17(c) must be admissible as evidence at trial. *See Nixon supra*, 418 U.S. at 700, 94 S.Ct. at 3103.

IV.

Video Tapes Subpoena

One of the primary concerns voiced by this court in *Model* I was the lack of specificity in the subpoenas at issue. Rather than requesting specific videotapes, the subpoena required Model to produce any video tapes that met a certain description detailed in the subpoena. We refused to enforce the subpoena because *inter alia*, its specificity was "illusory, since the categories described do not refer to particular tapes." *Model* I, *supra*, 829 F.2d at 1302. Although the subpoenas before us on this appeal do request the video tapes by title, we cannot find, on the record before us, that they satisfy either the relevancy or necessity requirements of Rule 17(c).

The commercial sale or exhibition of films is a form of expression strictly protected by the first amendment. *Joseph Burystn, Inc. v. Wilson*, 343 U.S. 495, 501-02, 72 S.Ct. 777, 780-81, 96 L.Ed. 1098 (1952). Thus, "the first amendment context of these

proceedings heightens the concern about burdensomeness and fourth amendment violations." *Model* I, *supra*, 829 F.2d at 1296. Taking these concerns into account in *Model* I, we quashed the subpoenas duces tecum not only because of their "illusory specificity," but also because "the presumptively protected materials they seek are otherwise procurable, and in a less intrusive manner." *Id.* at 1302. Such a ruling was required by *Nixon*, which held that the material sought by a subpoena duces tecum must not be "otherwise procurable reasonably in advance of trial by exercise of due diligence." *Nixon*, supra, 418 U.S. at 699, 94 S.Ct. at 3103.

Model contends that the subpoena duces tecum in this case is invalid because there has been no preliminary determination of whether there is probable cause to believe that the subpoenaed films are obscene. We disagree and reject Model's assertion that a finding of probable cause with respect to each item must precede issuance of a subpoena duces tecum in the context of materials presumptively protected by the First Amendment. No precedent exists for importing the full panoply of Fourth Amendment protections into the area of grand jury subpoenas and indeed to do so would transform this area of law substantially. A subpoena does not present the same kind of potential for intrusion upon the rights of privacy that a forcible search entails, and the resulting safeguards are therefore different. *See, e.g., United States v. Dionisio*, 410 U.S. 1, 93 S.Ct. 764, 35 L.Ed.2d 67 (1973) (subpoena compelling an individual to appear before grand jury does not constitute a Fourth Amendment "seizure").

Rather, we think that Model's protections lie not in the prior review which it seeks but in its own mo-

tion to quash. It is open to Model to object to the subpoena duces tecum as being "unreasonable or oppressive." Fed.R.Crim.Proc. 17(c). *See In re Grand Jury Subpoena*, 829 F.2d at 1305-07 (discussing the requirements for a valid grand jury subpoena). In this regard, if Model moves to quash the subpoena on the grounds that one or more of the films sought is not obscene, the district court must then undertake an *in camera* review of those films under the relevant legal definition of obscenity. *See Miller v. California*, 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973). If, during the course of its review, the court determines that protected films have been sought, the subpoena is invalid and must be quashed in its entirety.

We think this safeguard necessary to prevent overbroad subpoenas of films which are clearly protected by the First Amendment. Indiscriminate grand jury subpoenas of protected films could easily convey the impression that erotic or sensual depictions of any sort—including those that are not obscene—open their possessor to criminal prosecution. The fact that a particular film has been subject to subpoena may itself inhibit its display and distribution. The chilling effect of such sweeping and indiscriminate uses of the subpoena power is anything but fanciful; it is altogether real. On the other hand, we see no basis to retard the workings of the grand jury with the kind of burdensome procedures for prior review which appellant requests. Rather, our approach permits a grand jury to investigate criminal obscenity but prevents the grand jury from inhibiting presumptively protected expression which may not be obscene.

We also note that there is an additional means for obtaining these tapes other than the issuance of a subpoena duces tecum and an *in camera* review by the district court. This method would involve simply "buying the tapes and then subjecting them to a determination of obscenity in the eyes of the grand jury or a magistrate before issuing a subpoena duces tecum for particular tapes." *Model* I, *supra*, 829 F.2d at 1301. This court is acutely aware that in other pornography investigations the federal government has employed agents to deal in the purchase, sale and distribution of allegedly obscene material. *See, e.g., United State v. Guglielmi*, 819 F.2d 451 (4th Cir. 1987), *cert. denied*, 484 U.S. 1019, 108 S.Ct. 731, 98 L.Ed.2d 679 (1988). We fail to see why the government, in this case, refuses to obtain a copy of the requested videos by simply purchasing them.

Next, it appears to us that the government failed to establish the relevance of these video tapes to the grand jury investigation. In a case such as this the government "bears the burden of showing in what respect the [items] sought are material to any issue in the case. A mere hope that the [tapes], if produced, would contain evidence favorable to the [prosecution's] case will not suffice." *Layton, supra*, 90 F.R.D. at 516. *See also, United States v. Bookie*, 229 F.2d 130 (7th Cir.1956).

Having never viewed any of the 193 films in question, the government is unable to allege with any degree of certainty that these presumptively protected materials are in fact obscene. The allegations of the video's obscene nature, and therefore of their relevance, rest solely on the titles of the films.[4] Merely

[4] A random sample of the subpoenaed movies gives us these titles: "Down and Out in New York City", "Wild, Wild West",

alleging that the title of a film sounds "obscene", without offering a basis for this belief, does not satisfy the relevancy requirement of Rule 17(c). In essence the government is arguing that it cannot know if the material is obscene, and therefore relevant to its case, until it has examined it. By this argument the government is essentially "asking us to allow [them] to use Rule 17 as a device to embark on a fishing expedition.'" *Layton, supra*, 90 F.R.D. at 517.

With respect to materials presumptively protected under the first amendment, the government should be prepared to offer more evidence than the title of a work to prove its relevance to a pornography investigation. That evidence could include, but is by no means limited to, descriptions of the film found in the distributor's own promotional material or elsewhere.

We are unable to tell from the record what findings, if any, the district court made with respect to the relevancy of the named video tapes to the grand jury's investigation, or the necessity of a subpoena duces tecum as a tool for obtaining those tapes. For this reason we remand to the district court Model's motion to quash the subpoena requesting the movies, so that such findings can be made and incorporated into the record.

For the reasons set forth herein, we quash the subpoena duces tecum requesting the business records of R. Enterprises, Inc. and MFR Court Street Books, Inc. and we reverse those companies' convictions for civil contempt. We uphold the subpoena duces tecum

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"Working Girls", "69th Street Vice", "Having It All", "Tickled Pink", "A Little Romance", "Summer Break", "Charm School", and "Wild Things". We fail to see what, if anything, about these titles indicates anything of a sexual nature, much less obscenity.

requesting certain business records from Model Magazine, and we remand to the district court Model's motion to quash the subpoena duces tecum requesting one copy of each of the 193 named video tapes for findings regarding relevance and necessity.[5] Finally, we reverse Model's contempt conviction based on the company's refusal to turn over the requested tapes.

AFFIRMED IN PART, REVERSED IN PART, REMANDED IN PART.

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[5] We again note that the video tapes subpoena was addressed only to Model. No video tapes were requested from either R. Enterprises or MFR.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOURTH CIRCUIT

Nos. 86-5159(L), 86-5170, 86-5171 and 86-5173

IN RE GRAND JURY SUBPOENA:
SUBPOENA DUCES TECUM, PETITIONER

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

JOHN DOE 819 (MODEL MAGAZINE),
DEFENDANT-APPELLANT

IN RE GRAND JURY SUBPOENA:
SUBPOENA DUCES TECUM, PETITIONER

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

JOHN DOE 819 (MODEL MAGAZINE),
DEFENDANT-APPELLANT

IN RE GRAND JURY SUBPOENA:
SUBPOENA DUCES TECUM, PETITIONER

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

JOHN DOE 819 (METRO VIDEO),
DEFENDANT-APPELLANT

IN RE GRAND JURY SUBPOENA:
SUBPOENA DUCES TECUM

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

JOHN DOE 819 (METRO VIDEO),
DEFENDANT-APPELLANT

Decided April 19, 1988

Before PHILLIPS, ERVIN, and WILKINSON, Circuit Judges.

ON PETITION FOR REHEARING WITH SUGGESTION FOR REHEARING EN BANC.

PER CURIAM:

This court held that certain grand jury subpoenas duces tecum issued in the course of a government pornography investigation must be quashed, and reversed district court orders holding the subjects of the subpoenas in contempt for refusing to comply with them. *In re Grand Jury Subpoena: Subpoena Duces Tecum*, 829 F.2d 1291 (4th Cir.1987). Now before the court is the government's Petition for Rehearing with Suggestion for Rehearing En Banc in this case. On the basis set forth in this per curiam opinion, we deny the petition.

In its Petition for Rehearing with Suggestion for Rehearing En Banc, the government confessed the error of the position that it urged before this panel.

The government now concedes that "to the extent they require production of tapes with "lascivious (lewd, lustful) exhibition of the genitals or pubic area,' these subpoenas are overbroad." Because of this admission, the government necessarily agrees with the result reached in the panel's opinions; a subpoena that is invalid even in part must be quashed. *See Bowman Dairy v. United States*, 341 U.S. 214, 221, 71 S.Ct. 675, 679, 95 L.Ed. 879 (1951).

For the reasons expressed in the earlier majority opinion and separate concurring opinion in this case, that part of the subpoena which sought "lewd and lascivious" displays is impermissibly vague and overbroad. *See In re Grand Jury Subpoena supra.* The government's confession of error on this point and acquiescence as to the invalidity of the subpoena thus present a wholly sufficient ground for the resolution of this controversy. We now conclude, therefore, that our final disposition of this case should rest upon this ground alone, and we decline to address any further questions raised in the case prior to the government's change of position.

Because we now confine the holding in this case to the impermissible vagueness and overbreadth of the "lascivious (lustful, lewd) exhibition" portion of the subpoena, no basis remains for a rehearing or rehearing en banc. The contempt orders are reversed and the government's petition for rehearing and suggestion for rehearing en banc is therefore

DENIED.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOURTH CIRCUIT

Nos. 86-5159(L), 86-5171

IN RE GRAND JURY SUBPOENA:
SUBPOENA DUCES TECUM, PETITIONER (FOUR CASES)

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

JOHN DOE 819 (MODEL MAGAZINE),
DEFENDANT-APPELLANT (TWO CASES)

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

JOHN DOE 819 (METRO VIDEO),
DEFENDANT-APPELLANT (TWO CASES)

Decided Sept. 24, 1987

Before PHILLIPS, ERVIN and WILKINSON, Circuit Judges.

ERVIN, Circuit Judge:

These cases concern the permissible breadth and requisite specificity of a subpoena duces tecum that seeks the production of materials that are presumptively protected under the first amendment to the

United States Constitution. The cases arise on a motion to stay a contempt order. In their briefs and oral arguments the parties addressed the merits of the appeal from the contempt order. We therefore treat the issues before us on the merits, instead of limiting our consideration to the narrower request for a stay. Appeal of a civil contempt order is proper in this context. *See United States v. Ryan*, 402 U.S. 530, 532, 91 S.Ct. 1580, 1582, 29 L.Ed.2d 85 (1971); *Cobbledick v. United States*, 309 U.S. 323, 328, 60 S.Ct. 540, 542, 84 L.Ed. 783 (1940).

A party who chooses to run the risk of fines and imprisonment due to contempt can contest the validity of a subpoena in the role of contemner. If the subpoena is even partially bad, the contempt conviction should be reversed. "One should not be held in contempt under a subpoena that is part good and part bad. The burden is on the court to see that the subpoena is good in its entirety and it is not upon the person who faces punishment to cull the good from the bad." *Bowman Dairy v. United States*, 341 U.S. 214, 221, 71 S.Ct. 675, 679, 95 L.Ed. 879 (1951).

The subpoenas duces tecum involved in these cases were served upon appellants Model Distributors and Metro Video Distributors in October, 1986. Appellants, corporations located in New Jersey and New York, are apparently suspected by the government of having sent obscene videotapes into the Washington, D.C. metropolitan area for commercial purposes.[1] The

[1] Such activity could be found to violate 18 U.S.C. § 1465 (1982), which prohibits the transportation of obscene matters for sale or distribution:

> Whoever knowingly transports in interstate or foreign commerce for the purpose of sale or distribution any obscene, lewd, lascivious, or filthy book, pamphlet, picture,

government issued the subpoenas duces tecum in connection with a grand jury investigation into the distribution of obscene materials. The original subpoenas duces tecum were exactly alike. They sought:

> 1. Corporate tax returns for the years 1980 through 1985.
>
> 2. Any and all original records and documents including but not limited to: correspondence, notes, letters, invoices, memoranda, messages, receipts, shipping invoices and records, orders for merchandise, films and video tapes, contracts, license agreements, etc.; in other words, any and all records or documents between, to, from or concerning any of the following entities from 1980 to the present: [naming 11 entities].
>
> 3. One copy of any video tape cassette, 8 mm film or 16 mm film that visually depict [*sic*] any of the following:
>
> (a) the use of a minor engaging in sexually explicit conduct, that is:
>
> (1) sexual intercourse, including genital-genital, oral-genital, anal-genital or oral-anal, whether between persons of the same or opposite sex;
>
> (2) bestiality;
>
> (3) masturbation;
>
> (4) sadistic or masochistic abuse; or
>
> (5) lascivious (lewd, lustful) exhibition of the genitals or pubic area.

film, paper, letter, writing, print, silhouette, drawing, figure, image, cast, phonograph recording, electrical transcription or other article capable of producing sound or any other matter of indecent or immoral character, shall be fined not more than $5,000 or imprisoned not more than five years, or both. . . .

(b) adults engaging in sexually explicit conduct, that is:

(1) sexual intercourse, involving oral-genital, anal-genital or oral-anal, whether between persons of the same sex or opposite sex;

(2) bestiality;

(3) masturbation;

(4) sadistic or masochistic abuse; or

(5) lascivious (lewd, lustful) exhibition of the genitals or pubic area.

4. For the period 1980 to the present any and all documents and records concerning, referring to, naming, listing or in any way dealing with any visual depictions, i.e., video tape cassettes, 8 mm films, 16 mm films, etc., where the production of such visual depiction involves: [same categories as above, (a) and (b)].

5. For the period 1980 to the present any and all records and documents that reflect the payment of any things of value including, but not limited to, cash, money, checks, commissions, gifts and gratuities to any officer, employee, consultant, agent or in other words any payment of anything of value made to any individual or entity on behalf of [name of party], including, but not limited to: Forms W-2, 1099, 941 and 940, employee payroll ledgers, payroll account bank statements, cancelled checks, deposit tickets and debit/credit memoranda.

6. For the period 1980 to the present any and all cash recepits, records, cash disbursement records, general journals and ledgers including, but not limited to:

(a) invoices (sales and creditors and shipping receipts);

(b) accounts receivable/payroll;

(c) bank statements, cancelled checks, deposit tickets and debit/credit memoranda; and

(d) records of inventory.

The government met with counsel and the custodian of records for Metro Video Distributors and agreed to modify the subpoena duces tecum in several ways. In particular, Metro Video Distributors explained that it did not deal in tapes involving minors as specified in items 3(a) and 4(a) of the subpoena, so that compliance would consist in a custodian's explaining to the grand jury that no such tapes or records existed. The government postponed compliance on several other items. After a later meeting between the United States Attorney and counsel for Metro Video Distributors, the government agreed to limit the required production under items 3 and 4 to "only those titles which you characterize as x-rated." Model Distributors did not negotiate an agreement with the government.

Both Metro Video Distributors and Model Distributors moved to quash their subpoenas duces tecum in the United States District Court for the Eastern District of Virginia. At separate hearings before the same district court judge, the appellants argued that the production of tapes called for in item 3 of the subpoenas duces tecum was overly burdensome and violated their rights under the first and fourth amendments to the United States Constitution. The district court judge agreed with the government that production of the videotapes was not overly burdensome because the categories in the sub-

poenas duces tecum were specific. The government urged, and the court accepted, that a business enterprise, no matter how large, that sells videotapes will be familiar enough with the contents of those tapes to comply with subpoenas duces tecum such as these in a relatively short amount of time.

Metro Video Distributors claims to be one of the world's largest distributors of videotapes, with over 200 employees in seven areas around the country and Puerto Rico. Its inventory of videotapes purportedly exceeds 85,000 titles. Metro Video Distributors claims that less than one percent of the tapes that it distributes could be considered "x-rated and/or obscene." In response to the subpoena duces tecum, Metro Video Distributors identified 141 x-rated tapes. However, at the time of the district court's refusal to quash the subpoena, Metro Video Distributors indicated that it would refuse to comply with the item 3 request for the tapes in order to preserve its right to appeal in the posture of a contemner.

Model Distributors claims to distribute roughly 6,000 magazines and paperbacks and approximately 3,000 videotapes each week. Like Metro Video Distributors, it denies handling any items that involve child pornography, although it apparently has, to date, refused to place a corporate custodian on the stand to so testify. Model Distributors claimed in the district court that it had roughly 2,000 videotapes that might contain material described in the subpoena duces tecum that it had received.[2] Both appellants

[2] The government has collected all the catalogs, flyers and brochures that Model Distributors uses to solicit business. On the basis of these solicitation materials, the government claims that Model Distributors has, at most, 313 tapes for sale. The discrepancy—between the 2,000 and 313 figures—might be

point out that the titles of videotapes in their inventory and the boxes in which those videotapes are stored do not indicate whether any particular tape contains a "lewd display of genitals" or other form of sexual activity specified in the subpoenas.[3]

explained by means of the theory that the government advanced at oral argument. The government denied that it could simply put in a purchase order for all the types of tapes that it wanted, because Model Distributors might have other tapes that it was not currently marketing. Whatever the explanation, our analysis of burdensomeness is the same for the 141 tapes of Metro Video Distributors, as well as for the tapes in the possession of Model Distributors, whether those tapes number 313 or 2,000.

[3] The government produced an affidavit from an agent of the Federal Bureau of Investigation to which was attached a copy of Metro Video Distributors' Fall 1986 catalog for "X-rated Cassettes." The agent claimed that "by their very title I believe [they] may be obscene." There was no claim that the agent had purchased or viewed any films distributed by either appellant. Perhaps the special training of this agent has heightened his perceptual abilities beyond those of this court; however, it is hard to see what in these titles establishes good cause to believe that they fall into one of the subpoenaed categories. The first five titles are: "8 to 4," "Adam and Yves," "Adventure in San Fenleu," "Adventures of Rick Quick," and "Afternoon Delights." Some further suggestive entries are "Aunt Peg Goes to Hollywood," "Bodacious Ta-Tas," "If My Mother Only Knew," "The Postgraduate," and "Wanda Whips Wall Street."

After oral argument, the government produced an affidavit of a Model Distributors employee that suggests that salesmen can produce individual tapes that conform to the categories in the subpoena duces tecum. Besides the fact that this affidavit was not before the district court prior to the contempt ruling, it does not establish that either appellant knows the contents of its entire inventory well enough to comply without viewing many tapes.

For the purposes of this appeal, we deal only with those items in the subpoenas duces tecum calling for production of videotapes, packaging in which those tapes are contained,[4] and documents related to tapes involving listed categories of sexual activity. The requests for business records otherwise appear to be clearly delineated and not overly burdensome. It is only as to those items that require a prior identification of videotapes that we are troubled.

Model Distributors refused to produce the requested tapes or the boxes and containers in which they were stored, or documents relating to the sale of such tapes. It is unclear in the record before us whether business and tax records not linked to the videotapes have been satisfactorily produced. Metro Video Distributors apparently complied with the request for tax records and business dealings, but refused to deliver tapes conforming to the subpoena duces tecum.

The district court judge held Model Distributors in civil contempt and assessed a fine of $1000 for every day that it refused to comply with item 3 of the subpoena. The district court judge refused to stay this order pending appeal. Model Distributors applied for and received a stay from a panel of this court, pursuant to Fed.R.App.P. 8(a). Metro Video Distributors went before the district court thereafter and was held in civil contempt and assessed the same fine. Since we had already granted the motion of Model Distributors for a stay of its contempt order, the district court stayed the contempt order against Metro

[4] The government served a second subpoena on Model Distributors on the date of its initial hearing before the district court judge. This subpoena sought the cartons, boxes, and containers used to store the videotapes referred to in item 3 of the original subpoena.

Video Distributors until December 9, 1986, the date on which we had scheduled expedited oral argument by Model Distributors. We consolidated the motions for purposes of oral argument, and have extended the stay of the contempt order against Metro Video Distributors.

I.

Model Distributors and Metro Video Distributors argue that the subpoenas duces tecum involved in these cases are of unprecedented breadth, at least compared to other subpoenas for materials presumptively protected by the first amendment.[5] They assert

[5] That these videotapes are presumptively protected is clear. *See, e.g., Burstyn v. Wilson*, 343 U.S. 495, 501, 72 S.Ct. 777, 780, 96 L.Ed. 1098 (1951). The government's assertion that the categories of sexual activity to which the subpoenas duces tecum refer are the same as those categories mentioned in *Miller v. California*, 413 U.S. 15, 25, 93 S.Ct. 2607, 2615, 37 L.Ed.2d 419 (1973), does not transform the subpoenaed materials into "preseumptively obscene" matter outside of first amendment protection. It remains true that "[s]ex and obscenity are not synonymous," *Roth v. United States*, 354 U.S. 476, 487, 77 S.Ct. 1304, 1310, 1 L.Ed.2d 1498 (1957), so that the graphic depiction of sexual activity does not automatically push material beyond first amendment pale. The *Miller* definition of obscenity includes the requirements of "an average person, applying contemporary community standards," finding "the work, taken as a whole" appealing to "the prurient interests," 413 U.S. at 24, 93 S.Ct. at 2615, as well as the requirement of no "serious literary, artistic, political, or scientific value." *Id.* All of these guidelines must be considered by a trier of fact before material is legally considered "obscene." That is not an easy task for a neutral, detached magistrate. *See* Lockhart, "Escape from the Chill of Uncertainty: Explicit Sex and the First Amendment," 9 Ga.L.Rev. 533, 545-56 (1975); Gelhorn, "Dirty Books, Disgusting Pictures, and Dreadful Laws," 8 Ga.L.Rev. 291, 294-301 (1974). It is

that these subpoenas are "unreasonable and oppressive" in violation of FedR.Crim.P. 17(c),[6] that they constitute a prior restraint and will have a severe chilling effect on distribution of non-obscene videotapes, in violation of the first amendment to the United States Constitution, and that they amount to an unreasonable search and seizure in violation of the fourth amendment.[7] These claims must be con-

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obviously not a task that the government can shift to a private party merely by issuing a subpoena duces tecum listing categories of sexual activity. Nor do we think that the affidavit of the FBI agent, *supra* note 3, could possibly move all of the appellants' inventory outside first amendment protection. The agent did not even claim to have seen any tapes.

[6] (c) For Production of Documentary Evidence and of Objects. A subpoena may also command the person to whom it is directed to produce the books, papers, documents or other objects designated therein. *The court on motion made promptly may quash or modify the subpoena if compliance would be unreasonable or oppressive.* Fed.R.Crim.P. 17(c) (emphasis added).

[7] Appellants also appear to have advanced the argument below that production of the subpoenaed documents would violate their fifth amendment privileges under the "act of production" doctrine. *See United States v. Doe*, 465 U.S. 605, 104 S.Ct. 1237, 79 L.Ed.2d 552 (1984); *Fisher v. United States*, 425 U.S. 391, 96 S.Ct. 1569, 48 L.Ed.2d 39 (1976). The fifth amendment claim has not been advanced on appeal. We note in passing that this circuit has explicitly held that *Doe* did not change the long-standing rule that collective entities cannot assert fifth amendment privileges, for which see *Bellis v. United States*, 417 U.S. 85, 88, 94 S.Ct. 2179, 2183, 40 L.Ed.2d 678 (1974), and that in the case of summonses for corporate documents, an individual's "act of production" privilege will not bar enforcement against the corporation. *See United States v. Lang*, 792 F.2d 1235 (4th Cir. 1986); *see also In re Grand Jury Subpoena (85-W-71-5)*, 784 F.2d 857 (8th Cir. 1986), *cert. dismissed, See v. United States*, —— U.S. ——, 107 S.Ct. 918, 93 L.Ed.2d 865 (1987); *In re Grand Jury Subpoena Duces Tecum*, 769 F.2d 52 (2d Cir. 1985).

sidered together, because the first amendment context of these proceedings heightens the concern about burdensomeness and fourth amendment violations. Although there are no directly applicable privileges arising out of the constitutional claims in these cases, those constitutional claims do color the analysis of burdensomeness under Fed.R.Crim.P. 17(c).

It is well established that a district court judge normally has considerable discretion in making findings under Fed.R.Crim.P. 17(c), at least outside the first amendment context. *See, e.g., United States v. Nixon*, 418 U.S. 683, 702, 94 S.Ct. 3090, 3104, 41 L.Ed.2d 1039 (1974); *Matter of Klein*, 776 F.2d 628, 635 (7th Cir.1985); *In Re Grand Jury Matters*, 751 F.2d 13, 16 (1st Cir.1984). It is equally obvious that such discretion must be exercised carefully. *Klein*, 776 F.2d at 635; *In Re Grand Jury Proceedings*, 601 F.2d 162, 170 (5th Cir.1979); *cf. Nixon*, 418 U.S. at 702 (special circumstances may require appellate review to be "particularly meticulous"). Subpoenas duces tecum are not insulated from review merely because they are issued in connection with a sitting grand jury. They are issued pro forma with no prior court approval. As such they are instrumentalities of the United States Attorney's office although issued under the district court's name and for the grand jury.

The grand jury's investigative powers are broad; its inquiries generally are "not to be limited narrowly by questions of propriety or forecasts of the probable result of the investigation. . . ." *Blair v. United*

States, 250 U.S. 273, 282, 39 S.Ct. 468, 471, 63 L.Ed. 979 (1919); *see also United States v. Bisceglia*, 420 U.S. 141, 147, 95 S.Ct. 915, 919, 43 L.Ed.2d 88 (1975); *United States v. Powell*, 379 U.S. 48, 57, 85 S.Ct. 248, 255, 13 L.Ed.2d 112 (1964). But "the powers of the grand jury are not unlimited. . . ." *Branzburg v. Hayes*, 408 U.S. 665, 682, 92 S.Ct. 2646, 2657, 33 L.Ed.2d 626 (1972); *accord United States v. Calandra*, 414 U.S. 338, 346, 94 S.Ct. 613, 619, 38 L.Ed.2d 561 (1974). The subpoena duces tecum "remains at all times under the control and supervision of a court." *United States v. Doe (Schwartz)*, 457 F.2d 895, 898 (2d Cir.1972). Beyond the explicit strictures of Fed.R.Crim.P. 17(c), the Constitution guards against abusive subpoenas duces tecum. "The Fourth Amendment provides protection against a grand jury subpoena duces tecum too sweeping in its terms 'to be regarded as reasonable.'" *United States v. Dionisio*, 410 U.S. 1, 11, 93 S.Ct. 764, 770, 35 L.Ed.2d 67 (1973) (quoting *Hale v. Henkel*, 201 U.S. 43, 76, 26 S.Ct. 370, 380, 50 L.Ed. 652 (1906)); *Dionisio*, 410 U.S. at 47-50, 93 S.Ct. at 789-790 (Marshall, J., dissenting).[8] And the Court has made clear

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[8] In the case of *Hale v. Henkel*, Hale received a subpoena duces tecum commanding that he bring before a grand jury:

> 1. All understandings, agreements, arrangements, or contracts, whether evidenced by correspondence, memoranda, formal agreements, or other writings, between [his company] and six other firms and corporations named, from the date of the organization of [his company].
>
> 2. All correspondence by letter or telegram between [his company] and six other firms and corporations.
>
> 3. All reports made or accounts rendered by these six companies or corporations to the principal company.
>
> 4. Any agreements or contracts, or arrangements, however evidenced, between [his company and two others].
>
> 5. All letters received by [his company] since the date of its organization from thirteen other companies named, located in different parts of the United States, and also copies of all correspondence with such companies.

201 U.S. at 45, 26 S.Ct. at 371-72. The Court noted that a subpoena duces tecum could be an unreasonable search and seizure within the fourth amendment, and held:

> Applying the test of reasonableness to the present case, we think the subpoena duces tecum is far too sweeping in its terms to be regarded as reasonable. It does not require the production of a single contract, or of contracts with a particular corporation, or a limited number of documents, but all understandings, contracts, or correspondence between the MacAndrews & Forbes Company, and no less than six different companies. . . .
>
> [T]his mass of material . . . is not shown to be necessary in the prosecution of this case, and is clearly in violation of the general principle of law with regard to the particularity required in the description of documents necessary to a search warrant or subpoena. Doubtless many, if not all, of these documents may ultimately be required, but some necessity should be shown, either from an examination of the witness orally, or from the known transactions of these companies with the other companies implicated, or some evidence of their materiality produced, to justify an order for the production of such a mass of papers. *A general subpoena of this description is equally indefensible as a search warrant would be if couched in similar terms.*

201 U.S. at 76, 26 S.Ct. at 380 (emphasis added).

that the context of the first amendment intensifies the fourth amendment concerns that may be present in a sweeping subpoena duces tecum. *Branzburg*, 408 U.S. at 707-08, 92 S.Ct. at 2669-70 ("We do not expect that courts will forget that grand juries must operate

within the limits of the First Amendment. . . .") ; *id.* at 710, 92 S.Ct. at 2671 (Powell, J., concurring).

In sum, the fact that grand juries must have broad investigative powers does not resolve all questions of the permissible breadth and requisite specificity of a subpoena duces tecum. The public's undoubted "right to every man's evidence," *Branzburg*, 408 U.S. at 688, 92 S.Ct. at 2660, does not give government, for example, "an unlimited right to access to [private parties'] papers with reference to the possible existence of [illegal] practices." *Federal Trade Commission v. American Tobacco Co.*, 264 U.S. 298, 305, 44 S.Ct. 336, 337, 68 L.Ed. 696 (1924). "It is contrary to the first principles of justice to allow a search through all [a corporation's] records, relevant or irrelevant, in the hope that something will turn up." *Id.* A court, in deciding to enforce or to quash a subpoena duces tecum that broadly seeks material presumptively protected by the first amendment, must balance these concerns: on the one hand, the interest of the public and the government in ferreting out crime, on the other, the interest of the subpoena's target in conducting a business or any other personal affairs. The critical inquiry, assuming that the hurdle of relevancy has been cleared, is whether there is too much indefiniteness or breadth in the things required to be produced by the subpoena. *See Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186, 208, 66 S.Ct. 494, 505, 90 L.Ed. 614 (1945). The district court below showed no sensitivity to the need for such balancing and ordered enforcement of the subpoena on a rationale that we find chilling, as that word has come to be understood in the jurisprudence of the first amendment.

II.

The district court ordered enforcement of the subpoenas duces tecum despite the appellants' claims that they would have to spend countless hours viewing large numbers of tapes before they could know which tapes contained the subpoenaed categories of sexual activity. The district court rejected appellants' protestations on the theory that a business can be presumed to have knowledge of the specific contents of its inventory. In response to questions about burdensomeness, the government again underscored this theory in oral argument before this court.

This theory helps explain why the subpoenas duces tecum before us are not permissible. These subpoenas duces tecum are examples of those "legal devices and doctrines, in most applications consistent with the Constitution," but "which cannot be applied in settings where they have the collateral effect of inhibiting the freedom of expression, by making the individual the more reluctant to exercise it." *Smith v. California*, 361 U.S. 147, 150-51, 80 S.Ct. 215, 217, 4 L.Ed.2d 205 (1959). *Smith* forthrightly rejects the rationale urged by the government and applied by the district court in these cases to find that the subpoenas were not burdensome. That rationale is that a seller of books or movies can be presumed to have knowledge of all the contents of his ware. This presumption flies in the face of an important tenet of our system of free expression: "a man may the less be required to act at his peril here, because the free dissemination of ideas may be the loser." *Id.; see also Winters v. New York*, 333 U.S. 507, 510, 517, 518, 68 S.Ct. 665, 667, 671, 761. 92 L.Ed 840 (1948).

Like the statute struck down in *Smith*, the practice of issuing subpoenas like these and then expecting

vendors to comply based on their imputed knowledge of the contents of their inventories would tend seriously to restrict the dissemination of books and movies that are not obscene. Book and movie sellers would have an incentive "to restrict the books [or movies they] sell to those [they] have inspected; and thus the State will have imposed a restriction upon the distribution of constitutionally protected as well as obscene literature." *Smith*, 361 U.S. at 153, 80 S.Ct. at 218; *see also A Quantity of Copies of Books v. Kansas*, 378 U.S. 205, 210, 84 S.Ct. 1723, 1725, 12 L.Ed.2d 809 (1964) ("State regulation of obscenity must 'conform to procedures that will ensure against the curtailment of constitutionally protected expression, which is often separated from obscenity only by a dim and uncertain line.' ") (quoting *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 66, 83 S.Ct. 631, 637, 9 L.Ed.2d 584 (1963)).

Thus, even though the subpoenas duces tecum herein involved do not amount to a "prior restraint" on publication,[9] they exert a powerful chilling effect

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[9] The government sought only one copy of every requested tape. This distinguishes this case from those cases involving massive seizures of books that amounted to prior restraint. *See, e.g., A Quantity of Copies of Books v. Kansas*, 378 U.S. 205, 84 S.Ct. 1723, 12 L.Ed.2d 809 (1964); *Marcus v. Search Warrant*, 367 U.S. 717, 81 S.Ct. 1708, 6 L.Ed.2d 1127 (1961). The "substantial restraint" that a party must prove in order to invoke the nearly absolutely prohibition against pre-publication hindrances is absent from these cases. *See New York v. P.J. Video*, 475 U.S. 868, 106 S.Ct. 1610, 89 L.Ed.2d 871 (1986); *Heller v. New York*, 413 U.S 483, 490, 93 S.Ct. 2789, 2793, 37 L.Ed.2d 745 (1973). *But see Roaden v. Kentucky*, 413 U.S. 496, 504, 93 S.Ct. 2796, 2801, 37 L.Ed.2d 757 (1973) ("[W]ithout the authority of a constitutionally sufficient warrant, [seizure] is plainly a form of prior restraint and is, in those circumstances, unreasonable under fourth amendment standards.").

as enforced by the district court. First amendment rights do not vanish completely in the absence of prior restraint. *See, e.g., Heller v. New York*, 413 U.S. 483, 492, 93 S.Ct. 2789, 2795, 37 L.Ed.2d 745 (1973) (seizure of a single copy of a film is constitutionally permissible "if pursuant to a warrant, issued after a determination of probable cause by a neutral magistrate, and, following the seizure, a prompt judicial determination of the obscenity issue in an adversary proceeding is available at the request of any interested party"). First amendment rights need "breathing space to survive," *National Association for the Advancement of Colored People v. Button*, 371 U.S. 415, 433, 83 S.Ct. 328, 338, 9 L.Ed.2d 405 (1963), and courts are to protect them "not only against heavy-handed frontal attack, but also from being stifled by more subtle governmental influence." *Bates v. Little Rock*, 361 U.S. 516, 522, 80 S.Ct. 412, 416, 4 L.Ed.2d 480 (1960). The Supreme Court has demonstrated its willingness to curtail investigations by means of subpoenas, even those issued by legislative bodies, when the means of investigation intrude on the first amendment rights of parties who have not been demonstrated to have acted illegally. *See Gibson v. Florida Investigation Committee*, 372 U.S. 539, 544, 545, 558, 83 S.Ct. 889, 899, 9 L.Ed.2d 929 (1963). The task of weighing competing concerns in a case such as this one is "delicate and difficult" and a court must not give short shrift to the party asserting private constitutional rights. *Schneider v. State (Town of Irvington)*, 308 U.S. 147, 161, 60 S.Ct. 146, 151, 84 L.Ed. 155 (1939).

III.

The absence of a prior restraint also diminishes, but does not cancel, the fourth amendment concerns [10] presented by overly broad subpoenas duces tecum directed to material [11] presumptively protected under

[10] The sine qua non of such concerns is an expectation of privacy on the part of the party asserting the fourth amendment. *See United States v. Miller*, 425 U.S. 435, 443, 444 n. 6, 96 S.Ct. 1619, 1624, 1625 n. 6, 48 L.Ed.2d 71 (1976) ("narrowly directed subpoenas duces tecum"); *United States v. Dionisio*, 410 U.S. 1, 13-15, 93 S.Ct. 764, 771-772, 35 L.Ed.2d 67 (1973). But overbreadth in a subpoena duces tecum can itself require attention to fourth amendment standards of reasonableness. *See Dionisio*, 410 U.S. at 15 n. 13, 93 S.Ct. at 772 n. 13; *Hale v. Henkel*, 201 U.S. at 77, 26 S.Ct. at 380 (1906). In many cases similar to this one there will be no expectation of privacy, because the goods seized will have been held out to the public for sale. However, this is the case envisioned by *Dionisio* and *Hale* in which the subpoenas duces tecum go beyond matters held out to the public. The government made this clear at oral argument when it denied that it could have simply purchased hardcore tapes from Model Distributors and Metro Video Distributors. The government suggested that the appellants may have tapes that were not up for sale, but that should go before the grand jury. To the extent that this is true, some of the subpoenaed material is not held out to the public and its seizure is subject to fourth amendment concerns. To the extent it is not true, the tapes could have been procured in a less onerous manner.

[11] The subpoenas duces tecum are actually directed, of course, to corporations in this case. Corporations do not have the equivalent privacy rights of individuals. *See United States v. Morton Salt Co.*, 338 U.S. 632, 652, 70 S.Ct. 357, 368, 94 L.Ed. 407 (1950) (noting, however, that an overly broad investigation exceeds the government's power and that the demands or requests for information must be "not too indefinite"). But unlike the fifth amendment, which is wholly inapplicable to artificial entities, there are fourth-amendment-

the first amendment. When governmental searches trench on first amendment concerns, courts have been careful to scrutinize the searches much more closely than the district court did in this case. "The setting of the bookstore or the commercial theater, each presumptively under the protection of the First Amendment, invokes such Fourth Amendment . . . requirements because we examine what is 'unreasonable' in light of the values of freedom of expression." *Roaden v. Kentucky*, 413 U.S. 496, 504, 93 S.Ct. 2796, 2801, 37 L.Ed.2d 757 (1973). In *New York v. P.J. Video, Inc.*, 475 U.S. 868, 106 S.Ct. 1610, 89 L.Ed.2d 871 (1986), the Court held that a magistrate need not personally view allegedly obscene films prior to issuing a warrant authorizing their seizure, *id.* at 874 n. 5, 106 S.Ct. at 1614 n. 5, and that the standard of probable cause is the same for a seizure in a first amendment context as in any other. *Id.* But the Court reaffirmed that "[w]e have long recognized that the seizure of films or books on the basis of their content implicates First Amendment concerns not raised by other kinds of seizures. For this reason, we have required that certain special conditions be met before such seizures may be carried out." *Id.* at 873, 106 S.Ct. at 1614; *see also Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319, 326 n. 5, 99 S.Ct. 2319, 2324 n. 5, 60 L.Ed.2d 920 (1979) (first amendment

based reasonability limits on searches and seizures of corporate documents. *See Mancusi v. De Forte*, 392 U.S. 364, 88 S.Ct. 2110, 20 L.Ed.2d 1154 (1968); *Silverhorne Lumber Co. v. United States*, 251 U.S. 385, 392, 40 S.Ct. 182, 183, 64 L.Ed. 319 (1920) (Holmes, J.). *But cf. United States v. Calandra*, 414 U.S. 338, 352 n. 8, 94 S.Ct. 613, 622 n. 8, 38 L.Ed.2d 561 (1974) (limiting the exclusion of evidence from a *Silverthorne* violation).

imposes special constraints on searches for and seizures of presumptively protected material); *Stanford v. Texas*, 379 U.S. 476, 485, 85 S.Ct. 506, 511, 13 L.Ed.2d 431 (1965) (first amendment requires that the fourth amendment be applied with "scrupulous exactitude").

Even when the first amendment and fourth amendment problems raised by subpoenas duces tecum do not, in and of themselves, rise to the level of constitutional violations, the concerns that underlie those constitutional provisions must enter into the balancing of interests that is required by a motion to quash under Fed.R.Crim.P. 17(c). *See, e.g., In Re Grand Jury Matters*, 751 F.2d at 18. This rule of criminal procedure encapsulates the constitutional choices that must be made by a court reviewing a motion to quash a subpoena duces tecum. *See Oklahoma Press Publishing Co.*, 327 U.S. at 209, 66 S.Ct. at 506 ("[T]he requirement of reasonableness, including particularity in describing 'the place to be searched, and the persons or things to be seized,' also literally applicable to warrants, comes down to specification of the documents to be produced adequate, but not excessive, for the purposes of the relevant inquiry"). The Court in *Oklahoma Press* adverted to the danger of overbreadth associated with subpoenas: "it can be time consuming, clogging the processes of business. It can become persecution when carried beyond reason." *Id.* at 213, 66 S.Ct. at 508.

In these cases, the district court ordered Model Magazine to peruse what it claimed were 2,000 tapes for instances of the subpoenaed sexual activity. In the case of Metro Video, while the pool of tapes to be searched was reduced through negotiation to 141, it would still have been quite onerous to comply. The

normal subpoena duces tecum can impose heavy burdens of time and cost,[12] but these are not normal subpoenas duces tecum: they are directed to material that is presumptively protected under the first amendment. The government's strategy would impose heavy costs on distributors of videotapes simply because the government suspects some of their inventories to be obscene.

We find such a strategy to be "unreasonable and oppressive'" where, as here, there has been no attempt to take the much less drastic means of buying the tapes and then subjecting them to a determination of obscenity in the eyes of the grand jury or a magistrate before issuing a subpoena duces tecum for particular tapes. *See In Re Petroleum Products Liti-*

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[12] These subpoenas should be distinguished from tax summonses as regards the breadth of materials sought. Very broad tax summonses have been upheld against charges of overbreadth under the fourth amendment. *See, e.g., United States v. Arthur Young*, 677 F.2d 211, 216 (2d Cir. 1982) (requiring production of 250,000 pages of documents relating to the tax liability of Amerada Hess Corp. because "before the Service knows what the documents contain, it cannot describe them with any specificity"). *But see United States v. Richards*, 631 F.2d 341, 346 (4th Cir. 1980) (tax summons should be as narrow as possible); *United States v. Theodore*, 479 F.2d 749, 754 (4th Cir. 1973) (same). The reasoning that the Second Circuit used to justify a very broad summons is inapposite in the instant case, where federal investigators could quite easily have posed as buyers and sought the most obscene literature that appellants would sell them. The literature at issue, unlike tax documents, is either available for purchase or else not held out to the public, and hence private material. *But cf. United States v. Rosinsky*, 547 F.2d 249, 253 (4th Cir. 1977) (subpoenas are analogous to tax summonses with regard to fourth amendment claims concerning handwriting exemplars).

gation, 680 F.2d 5, 8-9 (2d Cir.1982); *In Re Grand Jury Proceedings Witness Bardier*, 486 F.Supp. 1203, 1210 (D.Nev.1980); *cf. Branzburg v. Hayes*, 408 U.S. at 706-07, 92 S.Ct. at 2669 (noting Justice Department guidelines admonishing that "all reasonable attempts . . . be made to obtain information from non-press sources before there is any consideration of subpoenaing the press").[13]

IV.

We are also troubled by the vagueness of the subpoenas' requirement to turn over tapes that have "lewd or lascivious displays of genitals or the pubic area." This is inherently nonspecific; it asks a vendor to determine what judges have had great difficulty determining: that "present critical point in the compromise between candor and shame at which the community may have arrived here and now." *United States v. Kennerley*, 209 F. 119, 121 (S.D.N.Y.1913) (Learned Hand, J.). One who is subpoenaed in such a fashion risks contempt for having a conception of lewdness or lasciviousness that differs from that of the community at large. A subpoena duces tecum should not require the recipient to determine at his own peril what he is to do, without clear guidelines for compliance. *See In Re Grand Jury Proceedings*, 601 F.2d 162, 170 (5th Cir. 1979); *cf. United States*

[13] Less drastic means of accomplishing governmental ends have often been required of statutes that impinge on the first amendments. *E.g., United States v. Robel*, 389 U.S. 258, 268, 88 S.Ct. 419, 426, 19 L.Ed.2d 508 (1967); *Sherbert v. Verner*, 374 U.S. 398, 407, 83 S.Ct. 1790, 1795, 10 L.Ed.2d 965 (1963); *Shelton v. Tucker*, 364 U.S. 479, 81 S.Ct. 247, 5 L.Ed.2d 231 (1960); *Thornhill v. Alabama*, 310 U.S. 88, 98, 60 S.Ct. 736, 742, 84 L.Ed. 1093 (1940); *see* Note, Less Drastic Means and the First Amendment, 78 Yale L.J. 464 (1969).

v. Richards, 631 F.2d 341, 346 (4th Cir.1980) ("specific questions directing the taxpayer's attention to areas of genuine concern to the Service are more appropriate than broad and general inquiries calling for subjective interpretation by the respondent under the threat of perjury"). Item 3(b)(5), which uses this "lewd or lascivious" standard, is the most egregious example of the "false particularity" of the subpoenas duces tecum before us. In general, the *categories of sexual activity* described in the subpoenas duces tecum are reasonably specific, but the *videotapes to which those categories apply* are not particularized at all. For this reason, the recipient of such a subpoena duces tecum is further placed at risk, beyond the fact that he is charged with knowledge of the contents of all his inventory. He must make judgment calls on the line between "lewd" and "erotic," at the risk of a civil contempt conviction. A subpoena duces tecum should be particular in a way that leaves as little discretion as possible to the recipient. *Cf. Zurcher v. Stanford Daily*, 436 U.S. 547, 98 S.Ct. 1970, 56 L.Ed.2d 525 (1978) ("Where presumptively protected materials are sought to be seized, the warrant requirement should be administered to leave as little as possible to the discretion or whim of the officer in the field.").

V.

We return to the inquiry under Fed.R.Crim.P. 17(c) with this constitutional background in mind. The traditional requirements for reviewing subpoenas duces tecum against charges of burdensomeness must be applied with greater care in cases such as these. Those requirements were enumerated in *United States v. Nixon*, wherein Chief Justice Burger wrote:

A subpoena for documents may be quashed if their production would be "unreasonable or oppressive," but not otherwise. The leading case in this Court interpreting this standard is *Bowman Dairy Co. v. United States*, 341 U.S. 214 [71 S.Ct. 675, 95 L.Ed. 879] (1951). This case recognized certain fundamental characteristics of the subpoena duces tecum in criminal cases: (1) it was not intended to provide a means of discovery for criminal cases . . .: (2) its chief innovation was to expedite the trial by providing a time and place before trial for the inspection of subpoenaed materials. As both parties agree, cases decided in the wake of *Bowman* have generally followed Judge Weinfeld's formulation in *United States v. Iozia*, 13 FRD 335, 338 (S.D. N.Y.1952), as to the required showing. Under this test, in order to require production prior to trial, the moving party must show: (1) that the documents are evidentiary and relevant; (2) that they are not otherwise procurable reasonably in advance of trial by exercise of due diligence; (3) that the party cannot properly prepare for trial without such production and inspection in advance of trial and that the failure to obtain such inspection may tend unreasonably to delay the trial; and (4) that application is made in good faith and is not intended as a general "fishing expedition."

Against this background, the Special Prosecutor, in order to carry his burden, must clear three hurdles: (1) relevancy; (2) admissibility; (3) specificity.

418 U.S. at 699, 94 S.Ct. at 3103.[14] The subpoenas duces tecum before us in these cases must be quashed, for the presumptively protected materials they seek are otherwise procurable, and in a less intrusive manner; the specificity of the subpoenas is illusory, since the categories described do not refer to particular tapes; as a result, the corporations before us would be required to perform burdensome searches and would be at risk for failing to fulfill vague requirements; in sum, the government appears to be engaging in a paradigmatic "fishing expedition." Since the district court made no careful finding, on the record, as to how the recipients of the subpoenas duces tecum could produce the requested tapes without spending hundreds of hours viewing them, we find the refusal to quash the subpoenas duces tecum arbitrary and we reverse the conviction for civil contempt.[15] In the

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[14] The *Nixon* Court was not reviewing a subpoena duces tecum in connection with a grand jury investigation, but we find that its gloss on Fed.R.Crim.P. 17(c) is equally applicable in this case.

[15] Contrary to the concurring opinion's reading of this reversal, we do not hold that any subpoena that targets the named categories of sexual activity must be quashed, or that degrading forms of obscenity are shielded from the reach of the grand jury. We insist only that the guarantees of the first and fourth amendments not be trampled by overly broad subpoenas. In particular, we simply identify the following ways in which these subpoenas are objectionable: they put sellers of presumptively protected material at risk identifying which tapes are being sought; they attempt to force sellers with large inventories of presumptively protected material to spend unknown hours reviewing tapes on the theory that such sellers are charged with knowledge of all particulars of their inventory, despite the rule of *Smith v. California*; they show no evidence of any prior review of the subpoenaed materials by anyone other than the FBI agent

future, when the government seeks to subpoena material that is presumptively protected by the first amendment, it should do so in the least intrusive manner possible, which means, at a minimum, by identifying the requested material in a way that allows the recipient of the subpoena to know immediately whether an item is to be produced or not. And in reviewing motions to quash such subpoenas duces tecum, district courts should balance the first and fourth amendment interests at stake against the marginal gain to the issuer of the subpoena in describing the materials by means other than the title of the work.

REVERSED.

WILKENSON, Circuit Judge, concurring separately:

I too would quash the subpoena and reverse the conviction for contempt. I would do so, however, for different reasons than those advanced by the majority.

In my view, both the government and the majority are guilty of excess. The government has drafted a subpoena whose vague and subjective boundaries threaten legitimate forms of artistic expression. The majority has shielded from the reach of the grand jury the most dehumanizing forms of pornography, which Congress has repeatedly condemned and the Supreme Court has repeatedly held is unprotected.

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who believed the titles alone revealed obscenity; and they are, as the concurring opinion admits, hopelessly vague. The concurring opinion notes, in part II.C., that a grand jury subpoena must not be unduly burdensome. That opinion fails to explain, however, what is meant by this prohibition.

I would permit a grand jury to subpoena a single copy of a distributor's video tape if there is a strong possibility that the film would be obscene and the subpoena does not excessively burden the distributors. Under this standard, the grand jury's request for films that contain scenes of specific sexual acts should be upheld. There is a strong possibility that those films may be obscene and compliance with the subpoena will not burden the distributors because the acts are specifically described.

In particular, I would uphold this subpoena insofar as it seeks any sexually explicit film involving minors or any film depicting adults engaging in bestiality, masturbation, sadistic or masochistic abuse, or the various forms of sexual intercourse described in the subpoena.

The remainder of the subpoena, calling for films with "lascivious, lewd, or lustful exhibition of the genitals or pubic area" should be quashed. While no one condones such depictions, those terms are hopelessly vague, which makes compliance difficult, and may both inhibit the production of and require the surrender of films that are not obscene. Because this portion of the subpoena is invalid, I would quash the subpoena in its entirety.

I.

This case presents new and difficult questions with respect to grand jury subpoena powers. The historic deference accorded the subpoena power collides here with historic protections of First Amendment rights. It is true that the grand jury has traditionally been able to subpoena any evidence that is marginally relevant to its investigation; the Supreme Court has consistently declined to impose any restrictions on this

broad investigatory power. This tradition of deference must end, however, when a grand jury begins to investigate the content of films or other presumptively protected modes of expression.

The Supreme Court has generally accorded the subpoena powers of the grand jury great respect. "Because its task is to inquire into the existence of possible criminal conduct and to return only well-founded indictments, [the grand jury's] investigatory powers are necessarily broad." *Branzburg v. Hayes*, 408 U.S. 665, 688, 92 S.Ct. 2646, 2660, 33 L.Ed.2d 626 (1972). These broad powers allow the grand jury to "compel the production of evidence or the testimony of witnesses as it considers necessary or appropriate, and its operation generally is unrestrained by the technical procedural and evidentiary rules governing the conduct of criminal trials." *United States v. Calandra*, 414 U.S. 338, 343, 94 S.Ct. 613, 617, 38 L.Ed.2d 561 (1974). The Court has been unwilling to restrict these powers because "a grand jury investigation is not fully carried out until every available clue has been run down and all witnesses examined in every proper way." *United States v. Dionisio*, 410 U.S. 1, 13, 93 S.Ct. 764, 771, 35 L.Ed.2d 67 (1973).

The majority would require the prosecution to purchase individual tapes and submit them for prior review before a subpoena may issue. In addition to the traditional restraints upon the subpoena power, the majority has thus imposed upon the grand jury a "least drastic means" test. *Ante*, p. 1301. In doing so, the majority is marching ahead of the Supreme Court, which has not suggested a least drastic means test for grand jury investigations of obscenity and which has supported the grand jury's investigative

powers even when constitutional values may be implicated. For example, the grand jury may question a suspect outside the presence of his attorney, *United States v. Mandujano*, 425 U.S. 564, 581, 96 S.Ct. 1768, 1779, 48 L.Ed.2d 212 (1975); a grand jury may use illegally-seized evidence, *United States v. Calandra*, 414 U.S. 338, 94 S.Ct. 613, 38 L.Ed.2d 561 (1974); a grand jury subpoena to testify is not a seizure under the fourth Amendment, *United States v. Dionisio*, 410 U.S. 1, 93 S.Ct. 764, 35 L.Ed.2d 67 (1973); and the grand jury does not have to give *Miranda* warnings before questioning a suspect. *Mandujano*, 425 U.S. at 580-81, 96 S.Ct. at 1778.

In keeping with this spirit of deference, the circuit courts have also allowed a grand jury to subpoena virtually any relevant evidence. "Once it is shown that a subpoena might aid the grand jury in its investigation, it is generally recognized that the subpoena should issue." *In re Antitrust Grand Jury Investigation*, 714 F.2d 347, 350 (4th Cir.1983). The party seeking to quash a subpoena must usually show that the requested information bears "no conceivable relevance to any legitimate objective of investigation by the federal grand jury." *In re Liberatore*, 574 F.2d 78, 83 (2d Cir.1978); *In Re Grand Jury Subpoena (Battle)*, 748 F.2d 327, 330 (6th Cir.1984). If we applied this lenient standard, Metro Video and Model Distributors would have to comply with the subpoena because the requested tapes are at least minimally relevant to the grand jury's obscenity investigation.

When applied to the run-of-the-mill grand jury subpoena, this deferential approach is certainly appropriate. A grand jury inquiry may be less intrusive and adversarial than other criminal investigations. Unlike a police investigation, the grand jury does not

stake out residences and businesses; procure evidence under false identities and pretenses; search homes, offices, or automobiles; or arrest suspects.

In particular, a grand jury subpoena may be a less drastic means of investigating obscenity violations than would purchases by the police. A subpoena remains subject to judicial control. *See Dionisio*, 410 U.S. at 9-11, 93 S.Ct. at 769-70. A subpoena by its terms limits what must be produced, while the only limit on a prosecutor's purchases is the size of his budget. Moreover, a narrowly crafted and openly served subpoena will inhibit the sale and distribution of protected materials far less than a random series of surreptitious purchases by prosecutors and police. Why the majority takes any comfort in police purchases of tapes and films is inexplicable.

Although a grand jury subpoena may be an appropriate form of investigation, it nonetheless raises substantial First Amendment concerns in this case. When the grand jury subpoenas the films or cassettes sold by a distributor, it does more than require the distributor to deliver one copy of these items; it puts the distributor and everyone in the community on notice that if they continue to sell such matter, they will be investigated and prosecuted. So long as the objects of the subpoena power are patently obscene, such *ad terrorem* tactics may escape constitutional censure. But the border zones of constitutional liberty must remain free of encroachment. Faced with sufficiently broad subpoenas and sufficiently serious threats of indictment, not only distributors—but the general community of artists, sculptors, painters and photographers may be reluctant to render erotic or sensual depictions of any sort, including those that would not be found obscene. Subpoenas of this kind could deal a

terrible blow to the vitality of artistic life, for the artist's imagination should not be chained to what conventional tastes deem polite and acceptable.

Despite the strong tradition of judicial deference, therefore, a grand jury does not have the unlimited right to chill protected speech. *See In re Grand Jury Proceedings*, 776 F.2d 1099, 1102-03 (2d Cir.1985); *Ealy v. LittleJohn*, 569 F.2d 219, 226-27 (5th Cir. 1978). A grand jury subpoena is "not . . . some talisman that dissolves all constitutional protections." *Dionisio*, 410 U.S. at 11, 93 S.Ct. at 770. Like any instrument of government, the grand jury must abide by the limits of the First Amendment. "No governmental door can be closed against the Amendment. No governmental activity is immune from its force." *Bursey v. United States*, 466 F.2d 1059, 1082 (9th Cir.1972). As the Supreme Court has explicitly noted, "we do not expect courts will forget that grand juries must operate within the limits of the First Amendment." *Branzburg*, 408 U.S. at 708, 92 S.Ct. at 2670.

Of course, the First Amendment does not prevent a grand jury from investigating criminal obscenity violations; the purveyors of obscenity cannot use the First Amendment as a shield against all governmental inquiry. A grand jury may subpoena certain categories of films, but only where there exists a strong possibility that those films may be obscene and where the subpoena is not excessively burdensome.

II.

The difficulty in this case, therefore, is determining when the grand jury's need for the films outweighs the restrictive effect of its subpoena. Two circuit courts have dealt with grand jury investigations that infringed on the First Amendment rights of speech

and association. Under the approach applied in these cases, a grand jury could investigate in a protected area if (A) the subpoena served a compelling state interest, (B) it requested evidence that was substantially related to the investigation, and (C) it did not unduly burden the witness. *In re Grand Jury Proceedings*, 776 F.2d 1099 (2nd Cir.1985); *Bursey v. United States*, 466 F.2d 1059 (9th Cir.1972). This approach is appropriate here because it allows a grand jury to subpoena films that will directly assist its obscenity investigation, but prevents the grand jury from inhibiting the circulation of expression that may well not be obscene.

A.

The first element of this approach requires that the subpoena must serve a compelling state interest. Most grand jury subpoenas satisfy this initial requirement because, if the grand jury is conducting a good faith investigation of crime, the subpoena serves a compelling state interest. *Branzburg*, 408 U.S. at 700, 92 S.Ct. at 2666; *In re Grand Jury Proceedings*, 776 F.2d at 1103. The determination of whether a compelling state interest is present does not turn on what type of crime the grand jury is investigating; the courts will not assign different values to a grand jury subpoena depending on the particular crime under investigation. *Branzburg*, 408 U.S. at 705-06, 92 S.Ct. at 2668-69.

This requirement is only intended to prevent a grand jury from issuing a subpoena for the sole purpose of harassment and intimidation. *Cf. Ealy v. LittleJohn*, 569 F.2d 219, 227-30 (5th Cir.1978). The subpoena issued in this case serves a compelling state interest; there is every reason to believe that the

grand jury is investigating Metro and Model for criminal activity in violation of 18 U.S.C. § 1465 (1982), which prohibits the interstate sale or distribution of obscene materials.

B.

If the grand jury is conducting a good faith investigation into possible criminal activity, the second element of the test allows it to subpoena films that are substantially related to the investigation. This element strikes the essential balance between the purposes of the grand jury and the protections of the First Amendment. Under this balance, the grand jury cannot restrict presumptively protected modes of expression simply because there is a slight chance that the film will assist the investigation. To subpoena such films, the grand jury must show a strong possibility that the requested films will expose criminal activity. *In re Grand Jury Proceedings*, 776 F.2d at 1103; *Bursey*, 466 F.2d at 1083.

Because the grand jury is conducting an obscenity investigation, the subpoenaed films are substantially related only if there is a strong possibility that the films are obscene. Of course, this is an area where definitional difficulties abound. The Supreme Court has struggled mightily to locate the point of protection along the continuum of speech. *See, e.g., Roth v. United States*, 354 U.S. 476, 487-89, 77 S.Ct. 1304, 1310-11, 1 L.Ed.2d 1498 (1957); *Memoirs v. Massachusetts*, 383 U.S. 413, 418-20, 86 S.Ct. 975, 977-78, 16 L.Ed.2d 1 (1966); *Miller v. California*, 413 U.S. 15, 24, 93 S.Ct. 2607, 2615, 37 L.Ed.2d 419 (1973); *New York v. Ferber*, 458 U.S. 747, 764-65, 102 S.Ct. 3348, 3358, 73 L.Ed.2d 1113 (1982); *Pope v. Illinois*,

—— U.S. ——, 107 S.Ct. 1918, 1921, 95 L.Ed.2d 439 (1987).

The prevailing definition of obscenity remains, of course, that of *Miller v. California*. The government attempts to resolve the definitional difficulty by tracking *Miller* in its subpoena and by describing specific sexual acts. In my judgment, this approach encounters several difficulties. I do not understand the *Miller* standard to be purely prescriptive, at least for the terms of a grand jury subopena. It was designed for use by a trier of fact evaluating a specific film, not for a grand jury trying to corral specific categories of films.

Moreover, the subpoena here lacks several *Miller* safeguards. Under the *Miller* test, a film is obscene if the average person, applying contemporary standards, would find that the film, taken as a whole, appeals to the prurient interest; if the film depicts patently offensive sexual conduct as defined by state law; and if the film, taken as a whole, lacks serious literary, artistic, political, or scientific value. *Miller v. California*, 413 U.S. 15, 24, 93 S.Ct. 2607, 2615, 37 L. Ed.2d 419 (1973); *See also Pope v. Illinois*, —— U.S. ——, 107 S.Ct. 1918, 1921, 95 L.Ed.2d 439 (1987) (applying a reasonable person standard to the third *Miller* requirement). While the subpoena describes certain "patently offensive [sexual] conduct," the requirement that the film, as a whole, lack literary or artistic merit is nowhere in evidence. Nor is there a requirement that the film, as a whole, appeal to the prurient interest.

These various shortcomings preclude, in my judgment, the simple enforcement of this subpoena on the authority of *Miller*. They do not, however, justify the sweeping invalidation of the subpoena ordered by the

majority. Much of the subpoena demonstrates the strong probability of obtaining highly relevant criminal evidence.

If any film is substantially related to an obscenity investigation, it is a film of bestiality, sadomasochistic sexual abuse, or child pornography. *See New York v. Ferber*, 457 U.S. 747, 102 S.Ct. 3348, 73 L.Ed.2d 1113 (1982). Congress has specifically targeted child pornography by prohibiting the advertisement or distribution of any depiction of a child engaged in sexually explicit conduct. 18 U.S.C.A. §§ 2251-52 (West Supp.1987). These portions of the subpoena simply do not suffer the problems of substantial overbreadth which would cause the Supreme Court to invalidate them. *See Broadrick v. Oklahoma*, 413 U.S. 601, 93 S.Ct. 2908, 37 L.E.2d 830 (1973). Thus, the subpoena's request for films with scenes of bestiality, sadistic or masochistic abuse, or minors engaged in any sexual exhibition or activity should be upheld.

Similarly, I would allow the grand jury to subpoena films involving masturbation and the specified forms of sexual intercourse. By listing these specific sexual acts, the grand jury has limited its subpoena to the mechanical depictions of sexual activity and abuse that usually appear solely in hardcore pornography. Such sexual activity is obviously not synonymous with obscenity, but it is a *sine qua non*. By quashing any subpoena that targets specifically the filmed depiction of the sexual practices most likely to be associated with obscenity, the majority has seriously impaired the grand jury from accomplishing the investigative purposes that Congress entrusted to it.

On the other hand, the grand jury has subpoenaed films containing lascivious or lewd exhibitions of the

genitals or pubic area. Divorced from the *Miller* safeguards and the *Miller* context, this portion of the subpoena might apply to any film that contains a scene of physical nudity or intimate affection. Sex may be a *sine qua non* of obscenity, but it is hardly synonymous with it. Great works of art illustrate the grace and beauty of the human body, even as there remains the potential for prurient exploitation of it. The line between the two is often difficult to draw; here, if anywhere, "one man's vulgarity is another's lyric." *Cohen v. California*, 403 U.S. 15, 91 S.Ct. 1780, 29 L.Ed.2d 284 (1971). Because this portion of the subpoena may easily apply to films that are not substantially related to an obscenity investigation, it should be quashed.

C.

The third and final requirement is that a grand jury subpoena not be unduly burdensome. The First Amendment prevents the grand jury from either requesting an excessive number of tapes or from issuing a subpoena with overly vague terms.[1] See *In re Rabbinical Seminary*, 450 F.Supp. 1078, 1084 (E.D.N.Y. 1978). A vague subpoena would require the distributor to implement a subjective legal standard, which he is poorly trained to do, and would ultimately force the distributor to choose between producing any film that may conceivably be obscene or assuming the risk of a subsequent contempt proceeding for inadequate compliance.

[1] The burden imposed by a request for an excessive number of obscene tapes is different than the burden posed by a vaguely worded subpoena. The burdensomeness of a request on a particular distributor is primarily a factual inquiry; the burdensomeness caused by the vagueness of a subpoena is primarily a question of law. By announcing on appeal that even the specifically-drawn portions of this subpoena are excessively burdensome, the majority has not only usurped the role of district courts, but provided distributors of any size with almost a per se defense against subpoenas whose terms are in no way overbroad or vague.

I cannot tell from this record whether compliance with this subpoena would be excessively burdensome on these defendants. The district court never made a finding on the number of films involved; Model and the government apparently disagree on the total number, with estimates ranging from 313 to over 2,000 tapes. In addition, there has been no finding on how difficult it would be for Metro and Model to screen their inventory of sexually explicit tapes. The distributors may or may not already know the contents of each video cassette, either from the display or from prescreening the films to satisfy future customer requests. When the record is undeveloped, an appellate court is a particularly poor place to judge this aspect of the burdensomeness inquiry, which emphasizes fact finding and is best resolved by the district court in its traditional role as supervisor of the grand jury. *In re Grand Jury Matters*, 751 F.2d 13, 16 (1st Cir. 1984).

An appellate court does not need findings of fact to determine whether a subpoena's terms are overly vague. The majority apparently believes that the subpoena would be more precise if it requested specific titles rather than specific acts. The request for films with bestiality, masturbation, and specific forms of intercourse, however, is not vague; these are specific acts that are readily identifiable.[2] This portion of the subpoena leaves no doubt about what films are

[2] Although it may be argued that the request for X-rated films with sadistic and masochistic sexual abuse is vague, that portion of the subpoena should be upheld. The government has an undeniably compelling interest in prosecuting the sale of such dehumanizing films that outweighs the burden on the film distributors.

involved. A distributor may have to look for these acts, but he will know them when he sees them.

The subpoena's request for films with lewd or lascivious exhibitions of the genitals or pubic area, however, is too vague. This section requires a film distributor to make a subjective decision about when an exhibition is lewd or lascivious and when it is not. The vice of a vague subpoena is that it may require a seller or distributor to surrender protected items. Because this request forces a distributor into overcompliance to avoid a contempt charge, it should be quashed. "When First Amendment interests are at stake, the government must use a scalpel, not an ax." *Bursey*, 466 F.2d at 1088.

III.

Obscenity law is a persistent area of tension. There will always be a public clamor to curb the degradation of human dignity and the exploitation of sexual expression that pornography represents. There will always be the danger that popular attempts to suppress it will bring down the censor's hand upon protected speech. There must always be courts to draw difficult lines, no matter how frustrating the attempt. Because the majority forsakes that task for a broad and blanket condemnation of this subpoena, I respectfully submit this separate statement.

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Alexandria Division

IN RE:
GRAND JURY 87-4
(John Doe 1094)

MOTIONS HEARING

June 17, 1988

Before: Claude M. Hilton, Judge

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[15] THE COURT: Okay. As far as—I don't think I need to hear any additional argument as far as these records subpoenas are concerned. I have read the submissions and I think I am clear in my mind what should be done about the records subpoenas.

It would seem to me that that first subpoena has very little effect other than, as the Government has indicated this morning, that as far as the effective date of it is concerned, I will consider that that first subpoena is simply merged into the second subpoena and forms only a date for the production. And I don't find that this subpoena is overly broad.

If this subpoena would require the shutting down of the operation and involved some kind of prior restraint or would tie up the company to the extent that it has been represented that it could if they have to take that information off of their computers, but the Government has offered to do that. And computers go from one tape to another, you can make

three of them at one time. And all you have to do is to press a button. And you can produce those tapes to the Government, I believe, without much difficulty. [16] I believe that the time constraints on this information is not unreasonable. And the motion to quash the records subpoena will be denied.

* * * * *

[19] THE COURT: As far as these 193 tapes are concerned, I believe that this subpoena does set forth, of course, with specificity the tapes that are to be produced in accordance with what the Fourth Circuit has indicated that is necessary.

I also think that the Government has made sufficient representations that in connection with the viewing of tapes supplied in the other investigation involving *Pryba* and others which has been referred to here, and their review of the titles of these tapes, that there is sufficient reason to think that these tapes are relevant to the investigation, and it is sufficiently specific. And your motion to quash this subpoena would be denied.

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

IN RE: GRAND JURY,
87-3, John Doe 1094

July 8, 1988

Before: The Honorable James C. Cacheris, United States District Judge

[20] THE COURT: * * *

This matter is before the Court on the motion of R [21] Enterprise, doing business as Coast-to-Coast Video to quash a grand jury subpoena duces tecum directed to it. The case comes as a matter that has been reviewed by the Fourth Circuit in the case of In Re Grand Jury Subpoena Duces Tecum, 829 F.2d 1291, Fourth Circuit, 1987. The issues involving some of this case are involved.

In that case, let me put the quote in, at page 1295: For purposes of this appeal, we deal only with those items in the subpoenas duces tecum calling for production of videotapes, packaging in which these tapes are contained, and documents relating to tapes involving listed categories of sexual activity. The requests for business records otherwise appear to be clearly delineated and not overly burdensome. It is only as to those items that require a prior identification of videotapes that we are troubled.

The argument of R Enterprises is they have done no business in Virginia and that the government has not met its burden of, in essence, overcoming the

three hurdles of relevancy, admissibility, what have you; that's found on page 1301 of this opinion, that they have not overcome that burden.

The government's response to that is that they have the affidavit of Agent James Clemente in which he says, for purposes of this case, that he went and saw Mr. Rothstein at the 148 Lafayette Street address in New York and told [22] Rothstein that he had subpoenas for Model Magazine Distributors Inc., Coast-to-Coast Video and MFR Books, at which point he said it's all the same thing, I'm president of all three. Then he served him with a subpoena.

The evidence further stipulated is that the evidence would show from the Pryba case that Model sent material to Pryba in Maryland who, in return, distributed it to Virginia.

I think on the basis of Rothstein's statement there's sufficient connection with Virginia for further investigation by the grand jury, and I think that the fact that other judges have ruled on this, and that this case has been pending for two-and-a-half years and appears to be the same arguments raised in the other ones, I'm going to go ahead and deny the motion to quash at this time, noting R Enterprises' exception.

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

Grand Jury 87-4

IN RE: GRAND JURY INVESTIGATION,
JOHN DOE 1094
(Model Magazine Distributors)

and

GRAND JURY INVESTIGATION,
JOHN DOE 1094
(R Enterprises, Incorporated)

and

GRAND JURY INVESTIGATION,
JOHN DOE 1094
(MFR Court Street Books, Incorporated)

August 12, 1988

BEFORE:

THE HONORABLE T.S. ELLIS, III,
Presiding United States District Judge

[21] THE COURT: • • •

All right. This matter, this particular matter is here on the motion to quash by MFR Court Street Books, Inc. It is a subpoena for business records, as modified here orally in open court by the United States. And it is challenged on the ground essentially that it is a fishing expedition. And as the

movant has put it, the grand jury in the Eastern District of Virginia investigating obscenity should not, is not empowered to subpoena all the business records of an intrastate New York bookstore engaged only in sales in New York without any showing as to relevance.

The United States takes the position that they don't have to make a showing, any threshold showing of relevance and cite a number of cases in support of that. There is no Fourth Circuit decision directly in point. The *In re Grand Jury Subpoena* decision that appears at 829 Federal Second was superseded by subsequent opinion as a [22] result or owing to the narrowing of the issue that was ultimately presented.

I don't remember, Mr. Leiser, right off the bat—I don't believe this, there was anything else said other than it was superseded. Is that correct?

* * * * *

The subsequent opinion appears at 844 Federal Second 202. And that opinion indicates that their resolution of the matter rests only on the ground that lewd and lascivious is impermissibly vague and overbroad.

And the opinion specifically declines to address any further questions raised in this case prior to the government's approval. And the obvious implication of that [23] is that the Fourth Circuit does not intend that their opinion at 829 Federal Second 1291 have controlling effect.

Nonetheless, it isn't something, as I indicated earlier, Mr. Leiser, in another hearing, that the Court is likely to ignore.

That majority opinion does suggest that some threshold showing of relevancy is required.

The opinion, the authority cited by the United States suggests that the majority of the jurisdictions do not require such a threshold showing. And this Court would be inclined to agree with that.

But quite apart from that, assuming, even assuming that the Fourth Circuit would require a threshold showing of relevance, this Court goes on to determine whether such a showing of relevance has been made in this case. And it ultimately concludes that it has on the basis of the evidence that makes clear that the related entities—which the movant argues are not related, are separate entities—one of the related entities certainly did ship sexually explicit material into the Commonwealth of Virginia. And in addition, there was the statement to the, the authorities that the entities were related. Whether that in fact turns out to be the case or not is unclear.

But the subpoena has been tailored as modified by the United States in open court, to its dealings with [24] respect to Virginia. And in that context, the Court finds that there has been an adequate showing of threshold relevance. And it may be that, when the custodian appears and testifies, the dealings of MFR will have nothing whatever to do with the governments' investigation of possible illegality in connection with the shipment of obscene material in Virginia.

In reaching this conclusion, the Court also has considered and has reviewed the *FTC against American Tobacco Company* case, which is distinguishable. And in any event, the government here does not have, is not seeking to have unlimited access for the purpose of a fishing expedition. There is a threshold showing in this instance.

Nor does the Court believe that there is in this connection any impermissible chilling of First Amend-

ment rights. There isn't, as the Fourth Circuit has already found, there isn't indefiniteness and burdensomeness involved in this subpoena, and this Court agrees with that finding.

So the Court denies the motion to quash these, this subpoena for the business records of MFR.

* * * * *

[74] THE COURT: * * *

The Court finds on the basis of the submissions and the arguments made that indeed the three entities in this matter—that is Model Magazine Distributors, R Enterprises, Inc., and MFR Court Street Books, Inc.—have refused to produce material responsive to the subpoenas, which subpoenas have been found by Judge Hilton and Judge Cacheris on two different occasions, each of the subpoenas on one occasion, to be reasonable and not to warrant granting a motion to quash.

Nonetheless, the three entities have deliberately and intentionally and contumaciously determined not to produce it but rather to take a stand and to press this [75] issue. And so the Court finds each of those entities in contempt and imposes a fine of $500 per day so long as that contumacious, contemptuous conduct continues and advises, as you know, Mr. Schwarz and Mr. Fahringer, that that contempt, of course, can be stopped at any time by indicating a willingness to produce.

But I am going to stay the imposition of the fine pending an opportunity for these litigants to have their issues heard on appeal. There is no doubt in my mind that delay in the overall scheme of things, Mr. Leiser, might be something that's desirable to these movants and that they wish to take advantage of.

But I'm satisfied that in this instance the three entities are willing to proceed promptly with this matter. And the schedule that I will establish will ensure that that's the case.

Nor can the Court conclude that the matter is frivolous. This is an area in which there isn't a controlling decision directly in point on these issues unless the view is taken that this Court takes, namely, that these are fairly standard business subpoenas to a grand jury and ought to be complied with.

And I think there has been adequate showing, even if a showing were required, that the materials for MFR should be produced and also certainly an *a fortiori* [76] case for the other two entities.

Nonetheless, the Court does feel strongly that these parties ought to have their opportunity to have this matter heard on appeal before suffering the penalties of contempt. And accordingly, it does stay.

Now, the stay will be in effect only until the 22nd of August. It may be that some matters heard by the Fourth Circuit prior to that time will automatically dispose of these matters. I don't know. But that should give the parties sufficient time to take an expedited appeal to the Fourth Circuit.

In fact, I'd make it sooner than the 22nd except that this being the latter part of August, the Fourth Circuit judges in a panel of three—I don't, I don't have in mind an appeal to a single judge whose authority would only be to grant a stay. I'm doing that. The appeal I have you in mind taking is an appeal on the merits. And that will require a panel of three.

Now, with respect to Mr. Rothstein, I am of the view that Mr. Rothstein is the moving force behind the contemptuous and contumacious behavior. I believe Mr. Rothstein is the appropriate person to be

held ir contempt because as the sole stockholder/ president of these corporations, he's clearly the person who's taking the position that is contemptuous.

[77] Nonetheless, I will take under advisement whether he is to be held in contempt. I want to give you an opportunity, Mr. Leiser—I've given Mr. Fahringer an opportunity, and he has argued on the matter with respect to the lack of the Court's authority.

I'll take the matter under advisement. And should it be necessary, or should the Court be persuaded that it has the power to hold Mr. Rothstein in contempt, then I'll do so—I don't need any further oral argument—and I will order him incarcerated as provided in 1826.

But I would stay that also. I certainly do not want anyone incarcerated if there is—I want to give an opportunity to appeal. Indeed, I've done that in other matters where I have—it's got to be fairly frivolous, Mr. Leiser, before I'm going to take that position.

So what I'm doing is giving you an opportunity to submit additional material to persuade the Court that under 1826 it has the authority. I'm sympathetic to the substance of your arguments. Certainly in a functional sense, you're correct. But the Court has to be sensitive to the limits on its power and cannot issue punitive sanctions where it doesn't have the power to do so.

If it has the power to do so though, Mr. Fahringer, I'm indicating to you that I won't hesitate to do so and will do it for the length of the grand jury or 18 [78] months, whichever is less, as I recall the statute, and I would stay the imposition of that pending the appeal.

Now, if for some reason attributable to the Fourth Circuit, not attributable to the parties, but if for some

reason attributable to the Fourth Circuit—namely, that a panel is not available—then you will need to return to this Court to explain that and to see whether this Court's willing to extend its stay. In all likelihood, I would. But I'm of the view—and I think it's correct—that the Fourth Circuit can accommodate a full panel hearing in that timeframe.

APPENDIX G

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 88-5619

In Re: GRAND JURY 87-3 SUBPOENA DUCES TECUM

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

UNDER SEAL, DEFENDANT-APPELLANT

No. 88-5620

In Re: GRAND JURY 87-4 SUBPOENA DUCES TECUM

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

UNDER SEAL, DEFENDANT-APPELLANT

Filed: Dec. 12, 1989

On Petition for Rehearing with Suggestion
for Rehearing In Banc

The appellee's petition for rehearing and suggestion for rehearing in banc were submitted to the Court. In a requested poll of the Court, Judges Russell, Widener, Hall, Murnaghan, and Wilkins voted to rehear the case in banc; Chief Judge Ervin and Judges Winter, Phillips, Sprouse, Chapman, and

Wilkinson voted against rehearing the case in banc. As a majority of the judges voted to deny rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ADJUDGED AND ORDERED that the petition for rehearing and suggestion for rehearing in banc is denied.

Entered at the direction of Chief Judge Ervin with the concurrence of Judge Phillips and Judge Wilkinson.

For the Court,

JOHN M. GREACEN
Clerk

APPENDIX H

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA

TO: MFR Court Books, Inc.
148 Lafayette Street
New York, New York

SUBPOENA TO TESTIFY
BEFORE GRAND JURY

SUBPOENA FOR:

☐ PERSON ☒ DOCUMENT(S) OR OBJECT(S)

YOU ARE HEREBY COMMANDED to appear and testify before the Grand Jury of the United States District Court at the place, date, and time specified below.

PLACE

U.S. Federal Grand Jury
200 S. Washington Street
Alexandria, Virginia 22314

COURTROOM

DATE AND TIME

May 9, 1988
at 9:30 a.m.

YOU ARE ALSO COMMANDED to bring with you the following document(s) or object(s):

Any and all originals and all copies made before service of this subpoena in the actual or constructive possession of Model Magazine Distributors, Inc., Coast to Coast Video and MFR, Court Books, Inc., (the Corporations), for the period from April 1, 1984 to the current date of this subpoena, as listed below:

1. All corporate ledgers and journals, including but not limited to the General ledger, cash receipts journal, sales journal, cash disbursements journal, voucher register, and any other ledgers and journals maintained by the corporations.

2. All banking records, including but not limited to bank statements, cancelled checks, check vouchers, check books, stubs and/or registers, deposit tickets, savings account books, certificates of deposit and any other time deposits purchased or redeemed and records of any safe deposit boxes.

3. All records of loans and mortgages received and given by the Corporations including any and all correspondence related to such loans.

4. All financial statements.

5. All corporate contracts and lease agreements.

6. All records relative to the acquisition or sale of real and/or leasehold property, either improved or unimproved, including purchase contracts, settlement sheets, contracts of sale, deeds, mortgages, deeds of trust, and correspondence, memoranda, notes of meetings and/or telephone calls relating to or connected in any way with the acquisition or sale of property.

7. All sales invoices (not previously furnished), expense invoices and paid and unpaid bills.

8. All records of shipment.

9. All records of purchases of inventory and goods held for resale, including but not limited to, invoices from vendor, records of receipt, and records of material returned to the supplier.

10. All records relating to travel and entertainment expenses paid by or incurred on behalf of the Corporations, including but not limited to, vouchers, memoranda, correspondence and records of payment.

11. Copies of all federal, state and local tax returns for fiscal years ending March 31, 1986, 1987 and 1988 (when filed).

12. All records of investments made by or on behalf of the Corporations.

13. All records of asset acquisition, including but not limited to, fixed asset ledger, records of asset purchases or acquisition, records of assets sold or disposed of.

14. All files, correspondence, agreements, contractor or other records of consultants with/or of the Corporations.

15. All Articles of Incorporation, Minutes of Stockholders Meetings, Banking Resolutions, Corporate Ledger/Binders; Stock Certificate Ledger or Record, copies of annual reports and resolutions appointing directors and officers of the Corporations (not previously furnished):

This subpoena shall remain in effect until you are granted leave to depart by the court or by an officer acting on behalf of the court.

DORIS CASEY
Clerk

(By) Deputy Clerk

Date
4/22/88

This subpoena is issued on application of the United States of America

Name, Address and Phone Number of Assistant U.S. Attorney

Lawrence J. Leiser (703) 557-9100
Assistant United States Attorney
701 Prince Street
Alexandria, Virginia 22314

RETURN OF SERVICE [1]

RECEIVED BY SERVER

DATE
4/25/88

PLACE
26 Federal Plaza NY, NY 10278

SERVED

DATE
4/26/88

PLACE
148 Lafayette St. NY, NY 5th Floor

SERVED ON (NAME)
Martin Rothstein, President

SERVED BY

TITLE

STATEMENT OF SERVICE FEES

TRAVEL

SERVICES

TOTAL

---

[1] As to who may serve a subpoena and the manner of its service see Rule 17(d), Federal Rules of Criminal Procedure, or Rule 45(c), Federal Rules of Civil Procedure.

DECLARATION OF SERVER [2]

I declare under penalty of perjury under the laws of the United States of America that the foregoing information contained in the Return of Service and Statement of Service Fees is true and correct.

Executed on 4/26/88
Date

Signature of Server

26 Federal Plaza
Address of Server

[2] "Fees and mileage need not be tendered to the witness upon service of a subpoena issued on behalf of the United States or an officer or agency thereof (Rule 45(c), Federal Rules of Civil Procedure; Rule 17(d), Federal Rules of Criminal Procedure) or on behalf of certain indigent parties and criminal defendants who are unable to pay such costs (28 USC 1825, Rule 17(b) Federal Rules of Criminal Procedure)".

APPENDIX I

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA

TO: Coast to Coast Video
148 Lafayette Street
New York, New York

SUBPOENA TO TESTIFY
BEFORE GRAND JURY

SUBPOENA FOR:

☒ DOCUMENT(S) OR OBJECT(S)

YOU ARE HEREBY COMMANDED to appear and testify before the Grand Jury of the United States District Court at the place, date, and time specified below.

COURTROOM

PLACE

U.S. Federal Grand Jury
200 S. Washington Street
Alexandria, Virginia 22314

DATE AND TIME

May 9, 1988
at 9:30 a.m.

YOU ARE ALSO COMMANDED to bring with you the following document(s) or object(s):*

* If not applicable enter "none".

Any and all originals and all copies made before service of this subpoena in the actual or constructive possession of Model Magazine Distributors, Inc., Coast to Coast Video and MFR, Court Books, Inc., (the Corporations), for the period from April 1, 1984 to the current date of this subpoena, as listed below:

1. All corporate ledgers and journals, including but not limited to the General ledger, cash receipts journal, sales journal, cash disbursements journal, voucher register, and any other ledgers and journals maintained by the corporations.

2. All banking records, including but not limited to bank statements, cancelled checks, check vouchers, check books, stubs and/or registers, deposit tickets, savings account books, certificates of deposit and any other time deposits purchased or redeemed and records of any safe deposit boxes.

3. All records of loans and mortgages received and given by the Corporations including any and all correspondence related to such loans.

4. All financial statements.

5. All corporate contracts and lease agreements.

6. All records relative to the acquisition or sale of real and/or leasehold property, either improved or unimproved, including purchase contracts, settlement sheets, contracts of sale, deeds, mortgages, deeds of trust, and correspondence, memoranda, notes of meetings and/or telephone calls relating to or connected in any way with the acquisition or sale of property.

7. All sales invoices (not previously furnished), expense invoices and paid and unpaid bills.

8. All records of shipment.

9. All records of purchases of inventory and goods held for resale, including but not limited to, invoices from vendor, records of receipt, and records of material returned to the supplier.

10. All records relating to travel and entertainment expenses paid by or incurred on behalf of the Corporations, including but not limited to, vouchers, memoranda, correspondence and records of payment.

11. Copies of all federal, state and local tax returns for fiscal years ending March 31, 1986, 1987 and 1988 (when filed).

12. All records of investments made by or on behalf of the Corporations.

13. All records of asset acquisition, including but not limited to, fixed asset ledger, records of asset purchases or acquisition, records of assets sold or disposed of.

14. All files, correspondence, agreements, contracts or other records of consultants with/or of the Corporations.

15. All Articles of Incorporation, Minutes of Stockholders Meetings, Banking Resolutions, Corporate Ledger/Binders; Stock Certificate Ledger or Record, copies of annual reports and resolutions appointing directors and officers of the Corporations (not previously furnished).

This subpoena shall remain in effect until you are granted leave to depart by the court or by an officer acting on behalf of the court.

DORIS CASEY
Clerk

Date 4/22/88

This subpoena is issued on application of the United States of America

Name, Address and Phone Number of Assistant U.S. Attorney

Lawrence J. Leiser (703) 557-9100
Assistant United States Attorney
701 Prince Street
Alexander, Virginia 22314

APPENDIX J

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA

To: Custodian of Records
R Enterprise, Inc.
148 Lafayette Street
New York, New York

SUBPOENA TO TESTIFY
BEFORE GRAND JURY

SUBPOENA FOR:

☒ DOCUMENT(S) OR OBJECT(S)

YOU ARE HEREBY COMMANDED to appear and testify before the Grand Jury of the United States District Court at the place, date, and time specified below.

Place

U.S. District Court
200 S. Washington Street
Alexandria, Virginia

Courtroom

Date and time

July 19, 1988
9:30 a.m.

YOU ARE ALSO COMMANDED to bring with you the following document(s) or object(s): *

---

* If not applicable enter "none".

This subpoena shall remain in effect until you are granted leave to depart by the court or by an officer acting on behalf of the court.

Clerk

Doris R. Casey, Clerk of Court

(BY) DEPUTY CLERK

Date

June 27, 1988

This subpoena is issued on application of the United States of America	Name, address and phone number of assistant U.S. Attorney
United States Attorney	Lawrence J. Leiser, Asst. U.S. Atty. 1101 King Street, Ste. 502 Alexandria, VA 22314 (703) 557-9100

Subpoena Attachment

Any and all originals and all copies made before service of this subpoena in the actual or constructive possession of R Enterprises, Inc. for the period from April 1, 1984 to the current date of this subpoena, as listed below:

1. All corporate ledgers and journals, including but not limited to the General ledger, cash receipts journal, sales journal, cash disbursements journal, voucher register, and any other ledgers and journals maintained by the corporations.

2. All banking records, including but not limited to bank statements, cancelled checks, check vouchers, check books, stubs and/or registers, deposit tickets, savings account books, certificates of deposit and any other time deposits purchased or redeemed and records of any safe deposit boxes.

3. All records of loans and mortgages received and given by the Corporations including any and all correspondence related to such loans.

4. All financial statements.

5. All corporate contracts and lease agreements.

6. All records relative to the acquisition or sale of real and/or leasehold property, either improved or unimproved, including purchase contracts, settlement sheets, contracts of sale, deeds, mortgages, deeds of trust, and correspondence, memoranda, notes of meetings, and/or telephone calls relating to or connected in any way with the acquisition or sale of property.

7. All sales invoices [] not previously furnished), expense invoices and paid and unpaid bills.

8. All records of shipment.

9. All records of purchases of inventory and goods held for resale, including but not limited to, invoices from vendor, records of receipt, and records of material returned to the supplier.

10. All records relating to travel and entertainment expenses paid by or incurred on behalf of the Corporation, including but not limited to, vouchers, memoranda, correspondence and records of payment.

11. Copies of all federal, state and local tax returns for fiscal years ending March 31, 1986, 1987, and 1988 (when filed).

12. All records of investments made by or on behalf of the Corporations.

13. All records of asset acquisition, including but not limited to, fixed asset ledger, records of asset

purchases or acquisition, records of assets sold or disposed of.

14. All files, correspondence, agreements, contracts or other records consultants with/or of the Corporations.

15. All Articles of Incorporation, Minutes of Stockholders Meetings, Banking Resolutions, Corporate Ledger/Binders; Stock Certificate Ledger or Record, copies of annual reports and resolutions appointing directors and officers of the Corporations (not previously furnished).

APPENDIX K

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA

To: Custodian of Records
Model Magazine Distributors, Inc.
148 Lafayette Street
New York, New York

Subpoena To Testify
Before Grand Jury

Subpoena for:

☒ Person
☒ Document(s) or
object(s)

YOU ARE HEREBY COMMANDED to appear and testify before the Grand Jury of the United States District Court at the place, date, and time specified below.

Place	Courtroom
U.S. District Courthouse	Date and Time
200 S. Washington Street	June 12, 1988
Alexandria, Virginia 22314	at 9:30 a.m.

YOU ARE ALSO COMMANDED to bring with you the following document(s) or object(s): *

One copy of each individual title that is listed in the Attached Model Invoices. If invoice lists title in Beta Format, supply in VHS format if available, if not in Beta format.

This subpoena shall remain in effect until you are granted leave to depart by the court or by an officer acting on behalf of the court.

Clerk	Date
Doris Casey	6/2/88

By: Deputy Clerk

This subpoena is issued on application of the United States of America	Lawrence J. Leiser (703) 557-9100 Assistant United States Attorney 1101 King Street, Suite 502 Alexandria, Virginia 22314

☆ U. S. GOVERNMENT PRINTING OFFICE: 1990 262203 778

No. 89-1436

In The

Supreme Court of the United States

October Term, 1989

UNITED STATES OF AMERICA,

Petitioner,

v.

R. ENTERPRISES, INC. AND MFR COURT STREET BOOKS, INC.

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

HERALD PRICE FAHRINGER
DIARMUID WHITE
540 Madison Avenue
New York, New York 10022
(212) 751-1330

RALPH J. SCHWARZ, JR.
RICHARD S. BROWN, JR.
21 East 40th Street
7th Floor
New York, New York 10016
(212) 532-0911

Attorneys for R. Enterprises, Inc. and MFR Court Street Books, Inc.

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

COUNTER QUESTION PRESENTED

When a subpoena, seeking records related to activities protected by the First Amendment, is challenged by a substantial showing that the documents sought are unrelated to the criminal investigation, must the government then demonstrate that records demanded are "substantially" related to the grand jury investigation?

PARTIES TO THE PROCEEDING

In addition to the named parties, Model Magazine Distributors, Inc., (Model) was a party in the courts below.

Model has filed a cross-petition bearing #89-1606.

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STATUTES AND RULES:

No. 89-1436

In The

Supreme Court of the United States

October Term, 1989

UNITED STATES OF AMERICA,

Petitioner,

v.

R. ENTERPRISES, INC., AND MFR COURT STREET BOOKS, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

The respondents, R. Enterprises, Inc., and MFR Court Street Books, Inc., respectfully request that this Court deny the Government's petition for a writ of certiorari that seeks review of the opinion of the United States Court of Appeals for the Fourth Circuit. *United States v. R. Enterprises, Inc. and MFR Court Street Books, Inc.*, 884 F.2d 772 (4th Cir. 1989) (App. 1a-15a).[1]

[1] Refers to the Government's appendix.

Preliminary Statement

Conspicuously missing from the Government's petition for certiorari is any acknowledgment that the activities of R. Enterprises and MFR Court Street Books, Inc., (MFR) are protected by the First Amendment. Such a serious omission makes their petition most suspect. The First Amendment aspect of the case, of course, casts quite a different light over the Fourth Circuit's holding and lends it strength.

The Court of Appeals merely held that where a book store in Brooklyn and a distributor of films in Manhattan have demonstrated through elaborate affidavits in a motion to quash that their records have no conceivable connection with Virginia (the district of the investigation) then, and only then, must a prosecutor "offer some evidence of a connection between MFR and R. Enterprises and Virginia before it can subpoena the company's business records under 17(c)." (App. 9a).

The circuit court was careful to point out that "[b]ecause the Government has offered no such evidence," the relevance of the subpoenaed records was not established under Rule 17(c). (App. 9a, 884 F.2d at 777). This holding is completely consistent with the law governing grand jury investigations, and is particularly appropriate in any case implicating First Amendment considerations. The loyalties traditionally shown the First Amendment make this case different from other more pedestrian grand jury investigations which don't involve First Amendment values. For these reasons the Government's petition for certiorari should be denied.

STATEMENT OF THE CASE

This case began in October of 1986, when a grand jury in the Eastern District of Virginia, investigating shipments of alleged obscene materials into Virginia, issued a subpoena to Model Magazine Distributors, Inc. (Model), calling for the production of virtually all of its video tapes and business records. Model's contempt conviction for failing to produce video tapes was reversed because the subpoena was over broad. A petition for rehearing was denied. (App. 19a-56a; 829 F.2d 1291; App. 16a-18a, 844 F.2d 202)[2] *(Model I)*

In October of 1986, because of the grand jury investigation, Model discontinued all sales of video tapes, paperback books, and magazines in Virginia. (13)[3] These materials constituted less than one percent of all of Model's business. (15, 16, 17, 23) Model's distribution of products to Virginia was discontinued not because it believed the materials were unlawful, but simply to avoid the legal expense of a continuing investigation. (13)

MFR and R. Enterprises Have No Connection to Virginia

Despite Model's discontinuation of business in Virginia, in April of 1988, the prosecutor struck again with a new wave of subpoenas, directed not only to Model, but

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[2] The Fourth Circuit did not reach the question of the relevancy of business records in this earlier case.

[3] The page references in this answer which have no letter designation refer to the page numbers of the joint appendix filed in the Fourth Circuit.

also to MFR and R. Enterprises. The subpoenas required the production of virtually all of the business records of each company before the Virginia grand jury. (App. 70a-74a; 79a-82a) In support of the motions to quash, MFR and R. Enterprises established the following:

MFR is a small retail bookstore located in Brooklyn, New York. (506) Occupying a small store on Court Street that is approximately 15 feet wide and 45 feet deep, it sells paperback books, magazines and video tapes to local customers, and has never engaged in any interstate business in Virginia. (62, 341-342, 496, 512). R. Enterprises is a New York corporation that does business under the trade name of "Coast-To-Coast Video" in Manhattan. (471, 508, 518, 519) It distributes video-tapes but it has *never* sold or shipped any video tapes to the State of Virginia. (342) MFR Books, R. Enterprises and Model are separate and distinct corporations and file separate corporate tax returns. (506, 637, 638)

The government petition claims that Mr. Rothstein admitted to an FBI agent that "R. Enterprises, MFR Books, and Model were all the same thing." (Gov. pet. p. 3) However, the prosecutor has omitted critical portions of the quotation of the FBI agent in an effort to make it sound as if Mr. Rothstein said that all three companies were engaged in the same business.[4] While Mr. Rothstein

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[4] The statement that the prosecutor relies on was allegedly made solely in the context of accepting service of the three subpoenas. Mr. Rothstein allegedly said:

> "It's all the same thing, I am the president of all three." (401)

(Continued on following page)

owned all three corporations, it is clear that these were three separate corporations engaged in completely different business activities.

Indeed the Government never produced any proof from any source – confidential informants or otherwise – that R. Enterprises, Inc. or MFR ever engaged in any business in Virginia. (620, 637-638) These facts, along with others, were developed in great detail in affidavits made in support of the motions to quash the subpoenas served upon both MFR and R. Enterprises. (342-3; 494-497; 506-510; 620; 637-639).

After such a strong showing of no connection between MFR and R. Enterprises and Virginia, counsel urged that before respondents should have to deliver all their records to a grand jury sitting in a far off jurisdiction the Government should make some showing of how the records are relevant to that investigation. The Government refused, stating that they are not obliged to make any showing of relevance whatsoever. The district judges agreed with them but the Fourth Circuit disagreed. The Court of Appeals properly interpreted the law governing subpoenas before grand juries.

(Continued from previous page)

The fact that Mr. Rothstein was the president of all three for the purpose of accepting service of the subpoenas does not mean that all three entities were the same.

THE REASONS WHY THE WRIT SHOULD BE DENIED

The rule announced by the Fourth Circuit is consistent with an unbroken line of cases, extending over a long stretch of this Court's history. That rule, simply stated, is:

> When a subpoena, seeking records related to activities protected by the First Amendment, is challenged on the grounds that the documents sought are unrelated to the criminal investigation, the Government is obliged to make a showing that records demanded are "substantially" related to the grand jury investigation.

When a grand jury investigation impinges upon activities protected by the First Amendment, this Court has held that a prosecutor must show that there is "a substantial relation between the information sought and a subject of overriding and compelling state interest." *Branzburg v. Hayes*, 408 U.S. 665, 700 (1972). In the *Branzburg* case the Court sustained the grand jury subpoena over First Amendment claims because the information sought related "directly" to the criminal conduct being investigated.[5] 408 U.S. at 701, 708.

This Court has consistently held that there can be no interference with the circulation of books or films unless there is a preliminary determination of obscenity reached by a judicial officer which "focus[es] searchingly on the

[5] In *Branzburg*, relied upon so heavily by the prosecutor, this Court was careful to point out: "The sole issue before us is the obligation of [appellants] to respond to grand jury subpoenas as other citizens do and to [produce documents] *relevant* to an investigation into the commission of a crime." 408 U.S. at 682. (Emphasis supplied).

question of obscenity."[6] Where a distributor of books and films contests a subpoena on the grounds that the records sought have absolutely no relationship to the criminal investigation, then the Government must make some showing of relevance. Such a demonstration need not be as stringent as that applied to First Amendment materials themselves. But certainly some showing of relevance must be made before such an expansive demand for documents is authorized.

In a similar situation the Ninth Circuit, in a well reasoned opinion, embraced this very principle. In *Bursey v. United States*, 466 F.2d 1059 (9th Cir. 1972), the court held that questions addressed to the identification of those persons responsible for the publication of a newspaper were barred absent a showing that there was a " . . . substantial possibility that the information sought will expose criminal activity."[7] 466 F.2d at 1083.

[6] *Marcus v. Search Warrant*, 367 U.S. 717 (1961); *Quantity of Books v. Kansas*, 378 U.S. 205 (1964); *Lee Art Theater, Inc. v. Virginia*, 392 U.S. 636 (1968); *Heller v. New York*, 413 U.S. 483 (1973); *Roaden v. Kentucky*, 413 U.S. 496 (1973); *Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319 (1979); *Walter v. United States*, 447 U.S. 649 (1980); *New York v. P. J. Video*, 475 U.S. 868 (1986).

[7] In *Bursey* the Government's investigation involved an inquiry into persons responsible for the distribution of a newspaper. The investigation involved a suspected plan to assassinate the president of the United States. Nevertheless, the court there, in clear language, stressed:

> When Government activity collides with First Amendment rights, the Government has the burden of establishing that its interests are legitimate and

(Continued on following page)

Judge Wilkinson, in his concurring opinion in the Fourth Circuit in *Model I*, stressed that where a grand jury subpoena is directed towards films presumptively protected by the First Amendment, then it must serve a "compelling state interest." (App. 50a.) And even where there is a compelling state interest, restrictions on the First Amendment can be no greater than is essential to further the Government interest and must be *"substantially* related to the investigation." 829 F.2d 1305, emphasis supplied, (App 50a, 51a). *Citing Branzburg v. Hayes*, 408 U.S. 665 at 705-706 (1972); *Bursey v. United States*, 466 F.2d 1059 at 1083 (9th Cir. 1972).

The threat of invoking legal sanctions, implicit in a grand jury investigation, is all the more reason why the subpoenas were properly quashed. A grand jury's power of investigation does not carry with it the wholesale authority to issue subpoenas for the records of a small bookstore in Brooklyn. *Gibson v. Florida Legislative Investigation Committee*, 372 U.S. 539, 558 (1963). When such unwarranted investigations are launched into the realm of free expression, we have much to fear. Any assumption

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(Continued from previous page)

> compelling and that the incidental infringement upon First Amendment rights is no greater than is essential to vindicate its subordinating interests. 466 F.2d at 1083.

The *Bursey* court went on to emphasize:

> However, it [the Government] is obliged to show that there is a substantial possibility that the information sought will expose criminal activity within the compelling subject matter of the investigation. 466 F.2d at 1083.

that the probable failure of this grand jury investigation will amply vindicate the free circulation of adult materials is unfounded. For we know from experience that "the threat of sanctions may be deter . . . almost as potently as the actual application of sanctions. . . ." *NAACP v. Button*, 371 U.S. 415, 433 (1963).

It would be unthinkable to suggest that a Virginia prosecutor could subpoena a bookstore in Minnesota without any showing of relevance. The fear of an indictment is certainly every bit as inhibiting as the subpoenaing of a few films or books. Judge Wilkenson acknowledged the inhibiting impact of the ad terrorem tactics of subpoenaing a distributor's films. (App. 48a) Once a subpoena is challenged because the records sought are unrelated to the grand jury investigation, the Government is obliged to illustrate how those records are connected to the inquiry.

What possible relevance can the records of a retail store in Brooklyn have to an investigation in Virginia? The simple answer must be that the law requires some demonstration that there is a basis for commanding a local bookstore in Brooklyn to produce all of its records before a grand jury in a far off jurisdiction. That is all that the Respondents suggest must be done.

No one is urging that the Respondent's records are immune from discovery because they are engaged in activity protected by the First Amendment. We urge that before they can be subjected to such official demands – that inevitably chill the exercise of free expression – there must be a substantial showing of how it is that the records of a bookstore in Brooklyn, or a distributor of

films in Manhattan, are relevant to a grand jury investigation in Virginia.[8] Certainly such a requirement does not impose an unbearable burden upon the Government and at the same time it affords the public the fundamental protections guaranteed by the First Amendment.

The Fourth Amendment Relevancy Requirement

Even if this case only implicated the Fourth Amendment, this Court has recognized that there must be some showing of relevancy before a demand for documents will be judicially condoned. *Federal Trade Commission v. American Tobacco Co.*, 264 U.S. 298, 306 (1924).[9] The rule followed in most jurisdictions provides that when the subject of a subpoena makes a motion to quash that process, asserting good-faith complaints concerning the

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[8] The federal venue statute and the Constitution mandate that a person must be indicted in the place where the crime is committed. In terms of obscenity, this requires that a person be indicted either in the place to which the shipment is made, or the place from which it is made, or any place through which the material travels. Therefore, a grand jury sitting in the Eastern District of Virginia could not indict for a shipment or for mailing within New York or between any northeastern states. 18 U.S.C. 3237; F.R. Cr.P. Rule 18; *United States v. Peraino*, 645 F.2d 548 at 551 (6th Cir. 1981); *United States v. McManus*, 535 F.2d 460 (8th Cir. 1976); *United States v. Bagnell*, 679 F.2d 830 at 832 (11th Cir. 1982). (209-211; 346-349).

[9] In the *American Tobacco* case, this Court relying exclusively on the Fourth Amendment, held "(i)t is contrary to the first principles of justice to allow a search through all [a corporation's] records, relevant or irrelevant, in the hope that something will turn up." 264 U.S. at 306. The powers of the FTC are analogous to those of a grand jury. *United States v. Morton Salt Co.*, 338 U.S. 632, 642-643 (1950).

matter of relevance, the Government is obliged to indicate how it is the records challenged are relevant to the investigation.

Such a circumstance is quite different from those cases where a subpoenaed witness merely alleges – in a negative way – that the Government has not demonstrated how the demand for his records is relevant to the investigation. One can easily understand in those cases how courts have concluded that the prosecutor need not affirmatively demonstrate relevance. But when a recipient of a subpoena *affirmatively* shows that there is no "conceivable connection" between records demanded and the inquiring state, then the prosecutor must make some showing of relevance. For instance in *Hale v. Henkel*, 201 U.S. 43 (1906), a subpoena *duces tecum* for all the company's business records was held to be unreasonable absent a Government showing of *relevancy*. *See also Federal Trade Commission v. American Tobacco Co.*, 264 U.S. at 306.

The cases relied upon by Government fully support the rule as we have defined it. For instance, this court was quick to acknowledge in *United States v. Morton Salt Co.*, 338 U.S. 632, 642-643 (1950) that there is "a relevancy" requirement imposed upon the powers of the Federal Trade Commission. Significantly this court analogized the Federal Trade Commission's power of inquisition "to the Grand Jury." (338 U.S. at 642) *United States v. Dionisio*, 410 U.S. 1 at 9-10 (1973) does stand for the proposition that the public has a right to every man's evidence. But, the quoted passage relied upon by the Government is preceded by the critical statement, "the powers of a grand jury *are not unlimited* and are subject to the supervision of a judge." 410 U.S. at 9. (Emphasis supplied.) If relevancy

is not a limitation on what can be compelled before a grand jury, then *Federal Trade Commission v. American Tobacco Co.*, 264 U.S. at 306 has no meaning.[10]

And finally, *In re Grand Jury Subpoena (Battle)*, 748 F.2d 327 (6th Cir. 1984) and *In re Liberatore*, 574 F.2d 78 (2d Cir. 1978), relied upon by the Government, in reality support the "relevancy" requirement urged by the Respondents. For instance, *Battle* stands for the proposition that a party seeking to quash a subpoena bears the burden of establishing that "the information sought bears no conceivable relevance to any legitimate "investigation" and after such a showing, the Government must "make a minimal showing of relevancy of subpoenaed evidence." (748 F.2d at 330) And, the Second Circuit was careful to stress in *Liberatore*:

> "This is not to say, of course, that the grand jury is endowed with an absolute license to seek evidence not *relevant* to its investigative function, but we are only saying that the Government does not in each and every case bear the constant burden of initially showing the relevance of the particular evidence sought to be produced by way of a subpoena." (574 F.2d at 83, emphasis supplied)

The other circuit cases cited by the prosecutor are in the same vein. They fully support the Fourth Circuit's conclusion that once a recipient of a subpoena makes a detailed demonstration that the records have no

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[10] *Blair v. United States*, 250 U.S. 273 (1919) involved the question of jurisdiction not relevancy. There the witnesses challenged the jurisdiction of the grand jury and not the relevancy of their testimony.

"conceivable" relationship to the grand jury investigation, then the prosecutor must make a showing of how the records demanded are related to the investigation before enforcement of the subpoena will be granted.

And of course it bears repeating that when the subject of the grand jury investigation is engaged in activity that is protected by the First Amendment, the obligations imposed upon the Government are all the greater. For instance, this Court's decision in *Stanford v. Texas*, 379 U.S. 476 (1965), holding that the First Amendment requires that the Fourth Amendment be applied with "scrupulous exactitude," is most compelling. As a consequence, the Government in this case should be held to an even higher standard when the Respondents attack the subpoenas under the Fourth Amendment and the First Amendment.

In addition, there is a well-established colony of cases that require a showing of compelling Governmental interest before the production of business records of an enterprise engaged in First Amendment activities can be enforced and holds that justifiable goals may not be achieved by unduly broad means. In addition, the right to publish and distribute unpopular literature guaranteed by the First Amendment protects publishers, distributors, their employees and their suppliers and customers from inquiry concerning their identity in cases where there is no showing of a compelling need. *NAACP v. Alabama*, 357 U.S. 449 (1958); *Gibson v. Florida Legislative Investigation Committee*, 372 U.S. 539, 558 (1963); *Bursey v. United States*, 466 F.2d at 1085; *People v. Mishkin*, 17 A.D.2d 243, 234 N.Y.S.2d, 342 (1st Depart. 1962) aff'd 15 N.Y.2d 671, 255

N.Y.S.2d 881 (1964); *Natco Theaters Inc. v. Ratner*, 463 F. Supp. 1124 at 1132 (S.D.N.Y. 1979).

The presiding spirit of the "anonymity case law" supports the position of the Respondents. The production of the names and addresses of all its employees, suppliers and customers is unauthorized unless there is some showing that the grand jury is investigating, for instance, paperback book dealers in New York City or video stores in Yonkers, New York. It should be emphasized that the potential deprivation of First Amendment rights is *per se* irreparable without regard to any economic loss. For this additional reason, the Court should deny the Government's petition for certiorari.

And finally, it must be said that no one questions a prosecutor's right to investigate the distribution of allegedly obscene materials. Respondents claim no immunity from such an inquiry. All that is asked is that such an inquisition be conducted in a manner compatible with the constitutional requirements of the Fourth and First Amendments. In this way, a judge can preliminarily determine the necessity of the restraints imposed upon a seller of books and videotapes and can decide whether the invasion of privacy is warranted. Such a procedure protects the public from unwarranted deprivation of information and yet guarantees to the prosecutor the right to continue an investigation which may be legally justified. Once a court makes a determination that there is or is not justification, we have the satisfaction of knowing that the inquisition has "operated under judicial superintendence," with the assurance of "an almost immediate judicial determination of the validity of the restraint." *Bantam Books v. Sullivan, supra*, 372 U.S. 58 at 70 (1963)

To summarize our case in a few words, there is no way a federal prosecutor can possibly justify requiring Respondents to produce their records before a grand jury sitting in Virginia, for all those records relate to the distribution of presumptively protected literature outside of Virginia. Not only is this action unauthorized, but it will impose an impermissible prior restraint on the distribution of books and films to a public outside the confines of the Eastern District of Virginia.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

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(3)

No. 89-1436

In the Supreme Court of the United States

OCTOBER TERM, 1989

UNITED STATES OF AMERICA, PETITIONER

v.

R. ENTERPRISES, INC., AND MFR COURT STREET BOOKS, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY MEMORANDUM FOR THE UNITED STATES

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The court of appeals held that before the government may enforce compliance with a grand jury subpoena for corporate business records, it must establish that the subpoenaed materials would be "relevan[t]" and "admissible as evidence at trial." Pet. App. 10a. The court emphasized that unless grand jury subpoenas are held to such a strict threshold standard, they might be used as "a means of discovery in addition to that provided by Fed. R. Crim. Pro. 16." *Id.* at 9a. Applying that standard, the court quashed the subpoenas for respondents' corporate records. It concluded that the subpoenaed materials "would most likely be inadmissible on relevancy grounds at any trial that might occur," and that the records would therefore "fail to meet the requirement[ ] that any documents subpoenaed under

Rule 17(c) must be admissible as evidence at trial." *Id.* at 10a.

In our petition, we explained that the decision below cannot be squared with this Court's cases involving the role and functions of the grand jury. Moreover, we stated, the court of appeals' decision is in conflict with both the majority rule in the circuit courts (according to which the government need not make *any* preliminary showing of relevance in order to secure compliance with a grand jury subpoena), as well as with a minority rule (which imposes a modest threshold requirement on the government). Because the court of appeals' novel standard also threatens to disrupt routine grand jury investigations—as the present case vividly illustrates—the petition for a writ of certiorari should be granted.

1. We restate the court of appeals' decision because respondents evidently have no desire to defend it on its own terms. Instead, respondents defend a very different principle—one never articulated by the court below.

This is how respondents describe the "rule announced by the Fourth Circuit": "[w]hen a subpoena, seeking records related to activities protected by the First Amendment, is challenged on the grounds that the documents sought are unrelated to the criminal investigation, the Government is obliged to make a showing that [the] records demanded are 'substantially' related to the grand jury investigation." Br. in Opp. 6. The short answer is that the court of appeals announced no such rule. What the court said is that "any documents subpoenaed under Rule 17(c) must be admissible as evidence at trial." Pet. App. 10a. The court then applied that rule in deciding to quash the subpoenas in this case—finding that the subpoenaed materials "would most likely be inadmissible on relevancy grounds at any trial that might occur." *Ibid.* Respondents do not quote the court's actual language, let alone explain how that language can

be squared with respondents' quite different rendition of the decision below.

Respondents misread the court of appeals' decision in a second respect. As respondents view it, the rule adopted by the court of appeals applies only to subpoenas for records "related to activities protected by the First Amendment." Br. in Opp. 6. But the court of appeals did not confine its holding in that fashion. What the court said is that "any" record subpoenaed by the grand jury—whether or not "related" to First Amendment activity—"must be admissible as evidence at trial." Pet. App. 10a. The court of appeals' decision therefore sweeps quite broadly, and cannot on its face be confined in the way respondents suggest.

2. In any event, First Amendment principles do not support the court of appeals' decision—even if, as respondents contend, the decision could be confined to subpoenas for records related to activities protected by the First Amendment. In the first place, respondents do not explain why the First Amendment provides *any* protection to routine corporate records (as opposed to the actual videotapes).[1] Although respondents assert that the subpoenas will "inevitably chill the exercise of free expression" (Br. in Opp. 9), they offer no support for that prediction. And "[b]are

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[1] Cf. *United States* v. *Coates*, 692 F.2d 629, 633-634 (9th Cir. 1982) (Internal Revenue Service summons for corporate minute books of a church results in only an incidental burden on religion and is therefore enforceable); *United States* v. *Grayson County State Bank*, 656 F.2d 1070, 1073-1074 (5th Cir. 1981) (IRS summons for bank records of a church did not impermissibly chill the exercise of religion), cert. denied, 455 U.S. 920 (1982); *United States* v. *Freedom Church*, 613 F.2d 316, 320 (1st Cir. 1979) (IRS summons to church pastor for books of account, bank records, and lists of contributors upheld against free exercise and free association claims). Because the subpoenas at issue in this petition sought only routine corporate records—and not the actual videotapes—the cases cited by respondents at page 7 n.6 of their brief in opposition do not apply.

allegations of possible first amendment violations are insufficient to justify judicial intervention into a pending investigation." *Dole* v. *Milonas*, 889 F.2d 885, 891 (9th Cir. 1989).

What is more, even if the First Amendment were applicable to respondents' corporate books and records, it would not insulate respondents from the duty to respond to a grand jury subpoena. As this Court explained in *Branzburg* v. *Hayes*, 408 U.S. 665, 682 (1972), "the First Amendment does not invalidate every incidental burdening of the press that may result from the enforcement of civil or criminal statutes of general applicability."[2] Applying that principle, the Court in *Branzburg* held that the First Amendment does not shield a reporter from having to answer a grand jury's questions concerning an ongoing criminal investigation. See also *New York* v. *P.J. Video, Inc.*, 475 U.S. 868 (1986) (no special exemption for video store from the probable cause standard for search warrants); *Herbert* v. *Lando*, 441 U.S. 153 (1979) (no special exemption for the media from the general rules of pretrial discovery); *Zurcher* v. *Stanford Daily*, 436 U.S. 547 (1978) (no special immunity for the press from search warrants); *SEC* v. *McGoff*, 647 F.2d 185 (D.C. Cir.), cert. denied, 452 U.S. 963 (1981) (upholding subpoena issued by the Securities and Exchange Commission for corporate records relating to transactions with South Africa); *In re Grand Jury Matter (Gronowicz)*, 764 F.2d 983, 989 (3d Cir. 1985) (Garth, J., concurring), cert. denied, 474 U.S. 1055 (1986).

[2] Respondents contend (Br. in Opp. 6) that in *Branzburg* this Court "held" that whenever "a grand jury investigation impinges upon activities protected by the First Amendment, * * * a prosecutor must show that there is 'a substantial relation between the information sought and a subject of overriding and compelling state interest.' " In fact, *Branzburg* holds no such thing. Instead, the Court, noting that some of its prior cases had adopted a strict standard for "even an indirect burden on First Amendment rights," explained that the subpoena in *Branzburg* met that standard, *assuming* it was applicable. 408 U.S. at 700. Respondents give a very misleading characterization of the Court's opinion in *Branzburg* by omitting the first several words of the very sentence that they quote from the case: "*If the test is that* the government 'convincingly show a substantial relation between the information sought and a subject of overriding and compelling state interest,' * * *." *Ibid.* (emphasis added).

3. Respondents contend that by showing that R. Enterprises, Inc., and MFR Court Street Books, Inc., did no business in Virginia (Br. in Opp. 5), respondents demonstrated that the subpoenaed records bore "no conceivable relevance to any legitimate 'investigation' " (*id.* at 12). Having made that initial showing, respondents assert, the burden shifted to the government to "make a minimal showing of relevanc[e]"—a burden which, in respondents' view, the Government failed to carry. *Ibid.* That contention is mistaken for two reasons.

First, respondents once again defend a legal standard different from the one actually adopted by the court of appeals. As noted, the court of appeals imposed *on the government* the initial burden to prove that the subpoenaed materials would be relevant and admissible *at trial*. The court did *not* hold that the government's burden is triggered only when the target of the subpoena first demonstrates that the subpoenaed material "bears no conceivable relevance to any legitimate 'investigation.' " Br. in Opp. 12. The latter standard—which respondents derive (see *ibid.*) from *In re Grand Jury Subpoena (Battle)*, 748 F.2d 327 (6th Cir. 1984), and *In re Liberatore*, 574 F.2d 78 (2d Cir. 1978)—constitutes, as we noted in our petition (at 13-15), the majority rule among the circuits. Significantly, however, that was *not* the rule applied by the court of appeals. There is therefore no reason to suppose that the majority of circuits

would "fully support the Fourth Circuit's conclusion" in this case. Br. in Opp. 12.[3]

Second, and in any event, respondents did not demonstrate that the subpoenaed records bear no conceivable relevance to the grand jury investigation. Although respondents asserted, by affidavit, that R. Enterprises and MFR Court Street Books conducted no business in Virginia, the grand jury was not required to accept that assertion on faith. See *United States* v. *Morton Salt Co.*, 338 U.S. 632, 642-643 (1950) (the grand jury "can investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not"). Moreover, even if respondents transacted no business in Virginia, that would not render the subpoenaed records irrelevant to the grand jury investigation. At a minimum, the records might demonstrate a pattern and practice of obscenity violations, including out-of-state violations, and thus constitute evidence of knowledge and intent on the part of Martin Rothstein – who, as the district court found, owned not only the respondent companies but also Model Magazine, which *did* conduct business in Virginia. See Pet. App. 60a.

4. The actual holding of the court of appeals not only conflicts with decisions of this Court and of other courts of appeals, but also threatens to "saddle [the] grand jury with minitrials and preliminary showings" that will "assuredly impede its investigation and frustrate the public's interest in the fair and expeditious administration of the criminal laws." *United States* v. *Dionisio*, 410 U.S. 1, 17 (1973). The history of this case provides an excellent illustration of that danger. The subpoenas to R. Enterprises and MFR Court

[3] Although respondents speculate that the majority of circuits would "fully support the Fourth Circuit's conclusion" in this case (Br. in Opp. 12), respondents do not dispute the fact that the *legal standard* applied by the court below is in sharp conflict with the majority rule.

Street Books were first issued in April 1988. More than two years later, respondents have yet to produce the required documents. The court of appeals' decision strongly encourages such delaying tactics, and should be reversed.

For the foregoing reasons and those stated in our petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

KENNETH W. STARR
Solicitor General

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No. 89-1436

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UNITED STATES OF AMERICA, PETITIONER

v.

R. ENTERPRISES, INC., AND MFR COURT STREET BOOKS, INC.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether, before it may enforce compliance with a grand jury subpoena for corporate business records, the government must establish that the subpoenaed materials would be relevant and admissible at a trial on the merits.

PARTIES TO THE PROCEEDING

In addition to the named parties, Model Magazine Distributors, Inc., was a party in the courts below.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-15a) is reported at 884 F.2d 772. Earlier opinions of the court of appeals (Pet. App. 16a-18a and 19a-56a) are reported, respectively, at 844 F.2d 202 and 829 F.2d 1291.

JURISDICTION

The judgment of the court of appeals was entered on August 31, 1989. A petition for rehearing was denied on December 12, 1989 (Pet. App. 68a-69a). The petition for a writ of certiorari was filed on March 12, 1990, and was granted on June 11, 1990. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

RULE INVOLVED

Rule 17 of the Federal Rules of Criminal Procedure provides, in pertinent part, as follows:

> (c) **For Production of Documentary Evidence and of Objects.** A subpoena may also command the person to whom it is directed to produce the books, papers, documents or other objects designated therein. The court on motion made promptly may quash or modify the subpoena if compliance would be unreasonable or oppressive. The court may direct that books, papers, documents or objects designated in the subpoena be produced before the court at a time prior to the trial or prior to the time when they are to be offered in evidence and may upon their production permit the books, papers, documents or objects or portions thereof to be inspected by the parties and their attorneys.

STATEMENT

1. Since 1986, a grand jury sitting in the Eastern District of Virginia has been investigating allegations of interstate transportation of obscene materials. In early 1988, the grand jury issued a series of subpoenas to Model Magazine Distributors, Inc. (Model), and two related companies, respondents R. Enterprises, Inc., and MFR Court Street Books, Inc. (MFR).[1] The subpoenas sought a variety of corporate books and records. See Pet. App. 3a, 70a-82a. The grand jury subsequently issued two further

[1] The government had earlier sought to subpoena certain corporate records and videotapes in the possession of Model and another company, but the court of appeals had held those subpoenas to be too broad and too vague, and had refused to compel compliance with the subpoenas. See Pet. App. 19a-56a.

subpoenas to Model. The first called for additional business records; the second requested one copy of each of 193 identified videotapes that Model had shipped into the Eastern District of Virginia. *Id.* at 83a-84a; see *id.* at 4a.

2. Respondents moved to quash the subpoenas. Following extensive hearings in the United States District Court for the Eastern District of Virginia, the motions to quash were denied.

First, on June 17, 1988, Judge Hilton denied Model's motions to quash. Pet. App. 57a-58a. The court found that the two subpoenas for business records were sufficiently specific. *Ibid.* It also upheld the subpoena for the 193 videotapes, concluding that the tapes were relevant to the government's investigation and that production of the tapes would not constitute a prior restraint. *Ibid.*

Second, on July 8, 1988, Judge Cacheris denied the motion by R. Enterprises to quash the subpoena for business records. Pet. App. 59a-60a. The court found that the subpoena was "clearly delineated and not overly burdensome." *Id.* at 59a. The court also found a "sufficient connection" between R. Enterprises and the Eastern District of Virginia to warrant "further investigation by the grand jury." *Id.* at 60a. In particular, the court noted that Martin Rothstein, the owner of R. Enterprises, had admitted that R. Enterprises, MFR Books, and Model were "all the same thing." *Ibid.*

Finally, on August 12, 1988, Judge Ellis denied MFR's motion to quash the subpoena for business records. Pet. App. 61a-64a. The court stated that it was "inclined to agree" with "the majority of the jurisdictions," which do not require the government to make "a threshold showing" before a grand jury subpoena may be enforced. *Id.* at 63a. The court added, however, that "even assuming that the Fourth Circuit would require a threshold showing of relevance," the government had made such a showing in

this case. *Ibid.* The court found sufficient evidence that respondents were "related entities," at least one of which "certainly did ship sexually explicit material into the Commonwealth of Virginia." *Ibid.* The court also found the subpoena to be appropriately "tailored." *Ibid.* Characterizing the subpoenas in this case as "fairly standard business subpoenas," which "ought to be complied with," *id.* at 65a, the district court denied the motion to quash. When the companies thereafter refused to comply, the court found them in contempt. *Id.* at 64a.

3. The court of appeals affirmed in part, reversed in part, and remanded in part. Pet. App. 1a-15a. Relying on *United States* v. *Nixon*, 418 U.S. 683, 700 (1974), the court held that, pursuant to Rule 17(c) of the Federal Rules of Criminal Procedure, the government must "clear three hurdles" in order to secure the enforcement of a grand jury subpoena: "(1) relevancy; (2) admissibility; (3) specificity." Pet. App. 7a.[2] The court emphasized that unless grand jury subpoenas are held to such a threshold standard, they might be used as "a means of discovery in addition to that provided by Fed. R. Crim. Pro. 16." *Id.* at 9a. "The test for enforcement," the court explained, "is whether the subpoena constitutes 'a good faith effort to obtain identified evidence rather than a general "fishing expedition" that attempts to use the rule as a discovery device.' " *Ibid.* In order not to "undercut[] the strict limitation of discovery in criminal cases," *ibid.*, the court held that "any documents subpoenaed under Rule 17(c) must be admissible as evidence at trial," *id.* at 10a.

Applying those standards, the court first upheld the subpoenas to Model for business records. Pet. App. 7a-8a.

[2] The court of appeals recognized that the *Nixon* Court was reviewing a trial subpoena, not a grand jury subpoena, but it found the "interpretation of Rule 17(c)" articulated in the *Nixon* case "equally applicable in this case. Pet. App. 7a n.2.

It found the requested records to be sufficiently relevant because they would "most likely reveal whether the company's business dealings in Virginia resulted in the sale and or distribution of allegedly obscene materials in the state." *Id.* at 8a. In addition, the court had no doubt of "the necessity of a subpoena to obtain those records, as logically they are available only from the company itself." *Ibid.*

The court, however, quashed the subpoenas for the business records of MFR and R. Enterprises. Pet. App. 8a-10a. The court explained that the government had adduced no evidence that those companies had done business in the Eastern District of Virginia; the court therefore "fail[ed] to see how the records of those companies are relevant to a grand jury investigation" in the district. *Id.* at 9a. In addition, the court stated, any evidence of activities by the target companies outside the State of Virginia "would most likely be inadmissible on relevancy grounds at any trial that might occur." *Id.* at 10a. Accordingly, the court held, the subpoenas "fail to meet the requirement[] that any documents subpoenaed under Rule 17(c) must be admissible as evidence at trial." *Ibid.*

Finally, the court remanded Model's motion to quash the subpoena for videotapes. Pet. App. 10a-15a. The court held that the subpoenaed films were not shown to be obscene and that the government had failed to establish the relevance of the films to the grand jury's investigation. *Id.* at 12a-14a & n.4. It also noted that there were "additional means for obtaining these tapes other than the issuance of a subpoena duces tecum and an *in camera* review by the district court." *Id.* at 13a.[3]

[3] Although we disagree with the portion of the court of appeals' decision addressing the subpoena for the videotapes, we have not sought review of that portion of the court of appeals' judgment. Instead, we have sought review only of the ruling quashing the subpoenas for repondents' business records.

On December 12, 1989, the panel denied the government's petition for rehearing. By a vote of 6 to 5, the full court of appeals denied rehearing en banc. Pet. App. 68a-69a.

INTRODUCTION AND SUMMARY OF ARGUMENT

The court of appeals held that two grand jury subpoenas for business records had to be quashed because the government failed to show that the subpoenaed documents were "admissible as evidence at trial." Pet. App. 10a. The court based its decision on Rule 17(c) of the Federal Rules of Criminal Procedure, which permits the recipient of a grand jury subpoena duces tecum to move to quash the subpoena on the ground that "compliance would be unreasonable or oppressive."

The court of appeals' decision is both unprecedented and unwise. By requiring the government to prove the relevance of materials subpoenaed by the grand jury—and, to make matters worse, by requiring it to prove that the materials would be admissible at trial—the court below overlooked the unique role of the grand jury in our criminal justice system. Because the court of appeals' novel standard for grand jury subpoenas is inconsistent with the decisions of this Court and threatens to disrupt the ordinary operation of grand jury investigations, the judgment of the court of appeals should be reversed.

A. This Court has identified three general principles applicable to litigation involving grand jury issues. First, the rules and restrictions that apply at trial on the merits do not apply in the same way (and, in some cases, do not apply at all) to grand jury proceedings. Second, because the purpose of a grand jury investigation is to explore whether a crime has been committed and, if so, who has committed it, the precise nature of the offense, if any, is often not

clear until the evidence has been examined and the grand jury has reached the end of its task. Third, in order to discharge its functions the grand jury must not be sidetracked by ancillary litigation over questions such as the admissibility of evidence.

B. In resolving Rule 17(c) motions to quash grand jury subpoenas, most courts have been properly attentive to these general principles. They have held that the government has no duty to make a preliminary showing of relevance before it may secure compliance with a grand jury subpoena for non-privileged materials. And they have adopted a highly deferential standard of relevance. As articulated by several courts, that standard requires the subpoena to be upheld unless the recipient can prove that the requested materials bear "no conceivable relevance" to "any legitimate object of investigation by the federal grand jury."

Other courts—incorrectly, we believe—have imposed on the government the burden to prove that subpoenaed material is relevant to the grand jury investigation. That approach cannot be squared with this Court's grand jury decisions. Still less justified is the standard imposed by the court of appeals in this case, under which the government must prove that the subpoenaed materials would be relevant and admissible at a trial on the merits. Indeed, the Advisory Committee that drafted Rule 17(c) expressly considered but rejected a requirement that subpoenaed materials be found admissible before they could be inspected by the parties. And First Amendment principles do not support the court of appeals' decision—even if, as respondents contend, the decision could be confined to subpoenas for records related to activities protected by the First Amendment.

C. In moving to quash the subpoenas for corporate records in this case, respondents asserted that they had

done no business in the Eastern District of Virginia and that the subpoenaed material was therefore irrelevant to the grand jury investigation. Those allegations do not demonstrate that the information sought bears no conceivable relevance to any legitimate grand jury inquiry. In the first place, the grand jury was not required to accept respondents' assertions on faith, but was instead entitled to examine the evidence for itself. But even if respondents transacted no business in Virginia, that would not render the subpoenaed records irrelevant to the grand jury investigation, since the records might serve other valid purposes—such as shedding light on the activities of, and the relationships among, all the individuals and companies under investigation in this case.

ARGUMENT

THE COURT OF APPEALS ERRED IN QUASHING THE GRAND JURY SUBPOENAS SEEKING RESPONDENTS' CORPORATE RECORDS

A. The Rules Regarding Compliance With Grand Jury Subpoenas Must Be Guided By The Broad Investigative Responsibilities Of The Grand Jury

Under Rule 17(c) of the Federal Rules of Criminal Procedure, a court may quash or modify a subpoena "if compliance would be unreasonable or oppressive." See also *United States* v. *Calandra*, 414 U.S. 338, 346 n.4 (1974) (Rule 17(c) applies to grand jury subpoenas). As the Court has explained in a related setting, however, "what is reasonable depends on the context" in which a claim is made. *New Jersey* v. *T.L.O.*, 469 U.S. 325, 337 (1985). In defining the right to be free from an "unreasonable" subpoena—as in any other case in which "reasonableness" is the standard—"the specific content and incidents of this right must be shaped by the context in which it is asserted." *Wyman* v. *James*, 400 U.S. 309, 318 (1971) (quoting *Terry* v. *Ohio*, 392 U.S. 1, 9 (1968)).

In the case of grand jury subpoenas, the meaning of "unreasonable" and "oppressive" must take account of the role of the grand jury in our criminal justice system—and, in particular, its broad investigative responsibilities. "Because its task is to inquire into the existence of possible criminal conduct and to return only well-founded indictments," a grand jury's "investigative powers are necessarily broad." *Branzburg* v. *Hayes*, 408 U.S. 665, 688 (1972). While the powers of the grand jury are not unlimited, "the longstanding principle that 'the public . . . has a right to every man's evidence,' except for those persons protected by a constitutional, common-law, or statutory privilege, * * * is particularly applicable to grand jury proceedings." *Ibid.* Accord *United States* v. *Dionisio*, 410 U.S. 1, 9-10 (1973).

The Court has articulated three related principles designed to ensure that the grand jury can fulfill its broad investigative and accusatory mandate. These three principles inform the meaning of the terms "unreasonable or oppressive" in Rule 17(c) as applied to grand jury subpoenas.

First, the Court has held that the rules and restrictions that apply at a trial on the merits do not apply in the same way to grand jury proceedings. Because it has "[t]raditionally * * * been accorded wide latitude to inquire into violations of criminal law," the grand jury "may compel the production of evidence or the testimony of witnesses as it considers appropriate, and its operation generally is unrestrained by the technical procedural and evidentiary rules governing the conduct of criminal trials." *United States* v. *Calandra*, 414 U.S. 338, 343 (1974). Unlike a trial on the merits, "[a] grand jury proceeding is not an adversary hearing in which the guilt or innocence of the accused is adjudicated." *Ibid.* Accordingly, "[i]ts work is not circumscribed by the technical requirements governing the

ascertainment of guilt once it has made the charges that culminate its inquiries." *United States* v. *Johnson*, 319 U.S. 503, 510 (1943).

For example, in *Calandra*, the Court held the Fourth Amendment exclusionary rule inapplicable to grand jury proceedings. "Permitting witnesses to invoke the exclusionary rule before a grand jury would precipitate adjudication of issues hitherto reserved for the trial on the merits and would delay and disrupt grand jury proceedings." 414 U.S. at 349. Moreover, the Court emphasized, "[s]uppression hearings would halt the orderly progress of an investigation and might necessitate extended litigation of issues only tangentially related to the grand jury's primary objective." *Ibid.*

Similarly, in *Costello* v. *United States*, 350 U.S. 359 (1956), the Court refused to apply the rule against hearsay to grand jury proceedings. The Court noted that the American grand jury system derives from the English model, under which the work of the grand jury "was not hampered by rigid procedural or evidential rules." *Id.* at 362. In the English system, grand jurors "could act on their own knowledge and were free to make their presentments or indictments on such information as they deemed satisfactory." *Ibid.* To impose the rule against hearsay on the grand jury process would "run counter to the whole history of the grand jury institution, in which laymen conduct their inquiries unfettered by technical rules." *Id.* at 364.

In *United States* v. *Washington*, 431 U.S. 181 (1977), the Court again distinguished between the rules applicable to trial and those applicable to the grand jury. The Court held that the government did not violate the Fifth Amendment when it warned a witness in front of the grand jury of his right to remain silent. Rejecting the contention that the warning should have been given outside the grand jury

room, the Court explained that "this argument entirely overlooks that the grand jury's historic role is as an investigative body; it is not the final arbiter of guilt or innocence." *Id.* at 191. A witness's rights before the grand jury, the Court observed, are not the same as his rights at trial. Unlike in the grand jury, "it is well settled that invocation of the Fifth Amendment privilege * * * is not admissible in a criminal trial, where guilt or innocence is actually at stake." *Ibid.*

Second, the Court has emphasized that the rules applicable to grand jury proceedings must take into account the breadth of the grand jury's investigative responsibilities. "A grand jury investigation 'is not fully carried out until every available clue has been run down and all witnesses examined in every proper way to find if a crime has been committed.' " *Branzburg* v. *Hayes*, 408 U.S. at 701. It is often impossible to predict at the outset the course that the investigation will follow. Thus, "the identity of the offender, and the precise nature of the offense, if there be one, normally are developed at the conclusion of the grand jury's labors, not at the beginning." *Blair* v. *United States*, 250 U.S. 273, 282 (1919). Applying that principle, the Court has consistently held that the scope of the grand jury's inquiries cannot be confined by rules that depend, in any respect, on the outcome of the grand jury's efforts.

For example, in *Hale* v. *Henkel*, 201 U.S. 43 (1906), the Court rejected the contention that a witness may not be questioned prior to the return of an indictment. The Court explained that "[i]t is impossible to conceive that * * * the examination of witnesses must be stopped until a basis is laid by an indictment formally preferred, when the very object of the examination is to ascertain who shall be indicted." *Id.* at 65. Accord *United States* v. *Dionisio*, 410 U.S. at 16.

More recently, in *Branzburg* v. *Hayes*, *supra*, the Court rejected the contention that before a grand jury may subpoena a reporter for his source of information, the government must show that a crime has occurred and that the information is not available elsewhere. The Court explained that "only the grand jury itself can make this determination," in that the grand jury's role "includes an investigatory function with respect to determining whether a crime has been committed and who committed it." 408 U.S. at 701. "It is only after the grand jury has examined the evidence that a determination of whether the proceeding will result in an indictment can be made." *Id.* at 701-702. As the Court summarized the point in *Blair* v. *United States*, 250 U.S. at 282, the scope of a grand jury investigation "is not to be limited narrowly by questions of propriety or forecasts of the probable result of the investigation, or by doubts whether any particular individual will be found properly subject to an accusation of crime."

Third, the Court has emphasized that, in order to discharge its functions, the grand jury should not be interrupted by procedural detours. "Any holding that would saddle a grand jury with minitrials and preliminary showings would assuredly impede its investigation and frustrate the public's interest in the fair and expeditious administration of the criminal laws." *United States* v. *Dionisio*, 410 U.S. at 17. Accord *United States* v. *Calandra*, 414 U.S. at 350. As the Court explained in *Costello*, if a grand jury's work could be challenged on the grounds of adequacy or competence, "the resulting delay would be great indeed. The result of such a rule would be that before trial on the merits a defendant could always insist on a kind of preliminary trial to determine the competency and adequacy of the evidence before the grand jury." 350 U.S. at 363.

B. A Grand Jury Subpoena May Not Be Quashed On Relevance Grounds Unless The Recipient Demonstrates That The Materials Bear No Conceivable Relevance To Any Legitimate Subject of Grand Jury Inquiry

In resolving Rule 17(c) motions to quash grand jury subpoenas, most courts have taken close account of the foregoing principles. Applying those principles, the courts have generally held that the government has no duty to make a preliminary showing of relevance before it may secure compliance with a grand jury subpoena for non-privileged materials.[4] Instead, they have placed the burden on the recipient of the subpoena to prove that the request is improper. And most courts have held that burden to be an exacting one: as the Second and Sixth Circuits have held, the recipient must show that the materials bear no conceivable relevance to any legitimate subject of grand jury inquiry.

By contrast, the Third and Tenth Circuits have held that the government, not the subpoena recipient, bears the burden to prove relevance to the grand jury investigation. Imposing that burden on the government cannot be squared with this Court's grand jury decisions. Still less justified is the standard imposed by the Fourth Circuit in this case, under which the government must prove that the subpoenaed materials would be relevant and admissible at a trial on the merits.

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[4] In some cases, "a constitutional, common-law, or statutory privilege" (*Branzburg* v. *Hayes*, 408 U.S. at 688) may entitle the subpoena recipient to decline production. See, *e.g.*, *Kastigar* v. *United States*, 406 U.S. 441, 444-445 (1972) (Fifth Amendment); *Gelbard* v. *United States*, 408 U.S. 41, 46-51 (1972) (protection under 18 U.S.C. 2515 against unlawful wiretaps); *Fisher* v. *United States*, 425 U.S. 391, 402-405 (1976) (attorney-client privilege); *In re Sealed Case*, 676 F.2d 793, 808-811 (D.C. Cir. 1982) (work-product privilege). No such privilege applies in this case.

1. Although the courts of appeals describe the standard in different ways, a majority impose a heavy burden on the subpoena recipient to demonstrate the impropriety of the grand jury's request. In *In re Grand Jury Subpoena (Battle)*, 748 F.2d 327, 329 (1984), for example, the Sixth Circuit refused to quash a grand jury subpoena seeking "[a]ll books, papers, records, memoranda, and data" relating to certain discretionary bank accounts controlled by a former union official. The court rejected the official's contention that the government should be required to demonstrate the relevance of the requested records. Instead, the court explained, "[t]he burden is on the party seeking to quash the subpoena to show 'that the information sought bears "no conceivable relevance to any legitimate object of investigation by the federal grand jury,' " * * * or that there has been 'harassment or prosecutorial misuse of the system.' " *Id.* at 330.[5]

The Second Circuit follows the same rule. In *In re Liberatore*, 574 F.2d 78 (1978), the recipient of a grand jury subpoena duces tecum seeking handwriting exemplars and fingerprints contended that the government should be required to show the relevance and necessity of that information to the grand jury's investigation. After noting that the target had not preserved the issue for appeal, the court went on to reject the claim on the merits. The court explained that "the government does not in each and every case bear the constant burden of initially showing the relevance of the particular evidence sought to be produced by way of subpoena." *Id.* at 83. "Instead," the court continued, "the party seeking to quash a subpoena must carry the burden of showing that the information sought bears

[5] See also *In re Grand Jury Proceedings, John Doe (Weiner)*, 754 F.2d 154, 155-156 (6th Cir. 1985) (government need not make a showing of necessity before securing compliance with subpoena duces tecum to target's lawyer).

'no conceivable relevance to any legitimate object of investigation by the federal grand jury.' " *Ibid.*[6]

Other circuits, while not employing the "conceivable relevance" test by its terms, have likewise declined to require the government to make a preliminary showing of relevance in order to enforce a grand jury subpoena duces tecum. In *In re Grand Jury Proceedings (Bank of Nova Scotia)*, 691 F.2d 1384 (11th Cir. 1982), cert. denied, 462 U.S. 1119 (1983), for example, the recipient of a documents subpoena resisted production, contending that the government should first be required to show "that the documents sought are relevant to an investigation properly within the grand jury's jurisdiction and not sought primarily for another purpose." 691 F.2d at 1387. The Eleventh Circuit rejected that claim and enforced the subpoena. Although the trial court had made no finding "that the documents sought were relevant or necessary for the grand jury's investigation," the court of appeals refused to devise any such requirement "absent some showing of

[6] See also *In re Grand Jury Subpoena Served Upon Doe (Roe)*, 781 F.2d 238, 248 (2d Cir. 1985) (en banc) (in rejecting claim that the government must show a need for information it subpoenas from the attorney of a target, the court stated: "To allow a grand jury target to challenge the subpoena on the basis of a 'need' requirement would seriously jeopardize the secrecy of the proceeding and the grand jury's investigative functions"), cert. denied, 475 U.S. 1108 (1986); *In re Grand Jury Subpoena Served Upon Horowitz*, 482 F.2d 72, 80 (2d Cir.) (with respect to documents dated at or about the time of the transactions at issue, the recipient of a grand jury subpoena must show "that a particular category of documents can have no conceivable relevance to any legitimate object of investigation by the federal grand jury"), cert. denied, 414 U.S. 867 (1973); *In re Grand Jury Subpoena Duces Tecum to John Doe Corp.*, 570 F. Supp. 1476, 1479-1480 (S.D.N.Y. 1983); *In re Grand Jury Subpoena Served Upon New York Law School*, 448 F. Supp. 822, 823-824 (S.D.N.Y. 1978); *In re Morgan*, 377 F. Supp. 281, 284 (S.D.N.Y. 1974).

harassment or prosecutorial misuse of the system." *Ibid.* To do so, the court reasoned, would "impose [an] undue restriction[] upon the grand jury investigative process." *Ibid.*

The Ninth Circuit has also refused to impose on the government the requirement to make a threshold showing of relevance or necessity. For example, in *In re Grand Jury Proceeding (Schofield)*, 721 F.2d 1221 (1983), a grand jury issued a subpoena to the former attorney of a target, seeking documents relating to the previous representation. The district court quashed the subpoena, stating that the government must first establish, by affidavit, the "legitimate need and relevance" of the requested information. *Id.* at 1222. The court of appeals reversed, holding that "[n]o affidavit of relevance and need must be introduced." *Id.* at 1223. The court explained that "[i]n view of the presumption that the government obeys the law * * * [there is] no reason to inject into routine grand jury investigations the delay and imposition upon district courts that will be opened up by a rule institutionalizing these disclaiming affidavits." *Ibid.*[7]

We believe those courts have employed the correct analysis—allocating the burden of proof to the recipient, and adopting a standard of relevance that respects the broad investigative functions of the grand jury. A rule requiring the subpoena recipient, rather than the government, to prove that compliance with the subpoena would be "unreasonable or oppressive" is faithful to the traditional approach of assigning the burden of proof to "the party asserting the affirmative of a proposition." *Mashpee Tribe* v. *New Seabury Corp.*, 592 F.2d 575, 589 (1st Cir.), cert.

[7] Accord *In re Grand Jury Proceedings (Hergenroeder)*, 555 F.2d 686 (9th Cir. 1977); *In re Grand Jury Proceedings*, 707 F. Supp. 1207, 1216 (D. Haw. 1989).

denied, 444 U.S. 866 (1979).[8] Moreover, assigning that burden to the recipient gives force to the presumption of regularity that generally attaches to grand jury proceedings. See *Hamling* v. *United States*, 418 U.S. 87, 139 n.23 (1974); *United States* v. *Johnson*, 319 U.S. 503, 512-513 (1943) ("burden" of challenging grand jury proceedings "would rest heavily on defendants"); *United States* v. *Mechanik*, 475 U.S. 66, 75 (1986) (O'Connor, J., concurring in the judgment) ("The grand jury proceeding is accorded a presumption of regularity, which generally may be dispelled only upon particularized proof of irregularities in the grand jury process").[9] And by requiring the recipient to bear the burden of proof, courts may diminish the occasions on which grand jury proceedings will be interrupted by "minitrials and preliminary showings" that interfere with the grand jury's work. *United States* v. *Dionisio*, 410 U.S. at 17.

It is also proper for courts to uphold grand jury subpoenas unless the requested documents lack any conceivable relevance to a legitimate subject of grand jury inquiry.[10] If the grand jury may initiate an investigation

[8] See also *Pacific Portland Cement Co.* v. *Food Mach. & Chem. Corp.*, 178 F.2d 541, 547 (9th Cir. 1949); *Reliance Life Ins. Co.* v. *Burgess*, 112 F.2d 234, 237-238 (8th Cir.), cert. denied, 311 U.S. 699 (1940); *In re Chicken Antitrust Litigation*, 560 F. Supp. 1006, 1008 (N.D. Ga. 1982); *Kalkowski* v. *Ronco, Inc.*, 424 F. Supp. 343, 353 (N.D. Ill. 1976).

[9] See also *United States* v. *Torres*, 901 F.2d 205, 232-233 (2d Cir. 1990); *First Nat'l Bank* v. *United States Department of Justice*, 865 F.2d 217, 219 (10th Cir. 1989); *United States* v. *McKie*, 831 F.2d 819, 821 (8th Cir. 1987); *In re Grand Jury Proceedings: Subpoenas Duces Tecum*, 827 F.2d 301, 304 (8th Cir. 1987); *United States* v. *Azad*, 809 F.2d 291, 295 (6th Cir. 1986), cert. denied, 481 U.S. 1004 (1987).

[10] That rule is consistent with this Court's decisions involving the permissible scope of administrative and congressional investigative subpoenas. See *McPhaul* v. *United States*, 364 U.S. 372, 381 (1960)

without having to satisfy any threshold evidentiary standard, as this Court has held, it would make no sense to impose such a standard indirectly by devising an exacting relevance requirement as a condition on the grand jury's exercise of its process. A standard of "conceivable relevance" is appropriate because it parallels the grand jury's authority to look into any conduct involving conceivable criminality. Under that standard, the scope of a grand jury subpoena will not be cabined by an unduly narrow prediction of the future course of the grand jury's investigative efforts. Unless the trial court is persuaded that there is no legitimate investigation to which the subpoenaed materials might relate, it must enforce the subpoena by its terms.

2. By narrowly confining the scope of relevance objections, the standard set forth above properly construes not only the words "unreasonable or oppressive" in Rule 17(c); it is also faithful to the remaining text of the rule. Rule 17(c) authorizes a court to quash a subpoena if "compliance" would be unreasonable or oppressive. By emphasizing "compliance," the rule focuses principally on the burdensomeness of production, not on the relevance of the materials requested. Indeed, the rule states that the trial court may permit the subpoenaed materials to be inspected "upon their production," without anywhere suggesting that a preliminary showing of relevance (let alone admissibility) is required.

(records subpoenaed by congressional subcommittee "were not 'plainly incompetent or irrelevant to any lawful purpose [of the Subcommittee] in the discharge of [its] duties' "); *Endicott Johnson Corp.* v. *Perkins*, 317 U.S. 501, 509 (1943) (evidence subpoenaed by the Secretary of Labor "was not plainly incompetent or irrelevant to any lawful purpose of the Secretary in the discharge of her duties"). See also *United States* v. *Morton Salt Co.*, 338 U.S. 632, 652 (1950) (with respect to an administrative subpoena, "it is sufficient if the inquiry is within the authority of the agency, the demand is not too indefinite and the information sought is reasonably relevant").

The history of Rule 17(c) confirms the point. The first draft of the Federal Rules of Criminal Procedure, dated September 8, 1941, included as Rule 45 a provision for subpoenas modeled after the civil rules. See 2 M. Rhodes, *Orfield's Criminal Procedure Under The Federal Rules* § 17:2, at 684 (2d ed. 1985). The draft rule lacked any provision for pretrial production and inspection of subpoenaed materials. See Tent. Draft (Sept. 8, 1941).[11] To remedy that shortcoming, the Advisory Committee added a new sentence, providing for pretrial *production* of subpoenaed materials. At the same time, however, the new sentence conditioned pretrial *inspection* of the materials upon a finding by the trial court that the materials were admissible. Thus amended, the rule (then Rule 59, in Tent. Draft 2 (Jan. 2, 1942)) provided that "[t]he court in its discretion may direct that books, papers, or documents designated in the subpoena shall be produced before the court at a time prior to the trial or prior to the time when they are to be offered in evidence and may upon their production determine their admissibility in evidence and may permit such portions thereof as may be found admissible to be inspected by the respective parties and their attorneys."

At a session on May 19, 1942, the Advisory Committee explicitly rejected the requirement that subpoenaed materials must be found to be admissible before they would be available for inspection. Mr. Dean explained that a court could not determine the admissibility of subpoenaed material in advance of trial, since "[t]hat would depend in many cases on what witness is on the stand, and so forth." 5/19/42 Tr. 459. Dean accordingly proposed

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[11] Copies of all materials cited in this paragraph and the next have been lodged with the Court for its convenience and have been provided to respondents' counsel. The originals are housed in the Archives.

that instead of admissibility, the rule require only "relevancy to the cause or to the case generally." *Ibid.* Another member of the Committee, Mr. Burns, went further, proposing that the Committee "take away that power" altogether. *Ibid.* "[T]o pass on legal questions in advance of trial," Burns stated, "would seem to me to be a concept that does not have any basis [i]n the needs of the defendant or the Government." *Ibid.* Burns therefore proposed that the language requiring a finding of admissibility be deleted from the text of the rule. Tr. 460. The other members readily agreed, and the motion to delete the admissibility requirement passed unanimously. Tr. 461.[12]

3. The "no conceivable relevance" test ordinarily will be satisfied only where the subpoenaed materials range so far afield as to suggest an abuse of the grand jury process. If, for example, the materials have been subpoenaed solely to prepare an indictment for trial,[13] or to inquire into civil matters,[14] or to promote some other improper end,[15] a

[12] The members of the Advisory Committee wondered aloud how the language requiring admissibility had ever been added to the proposed rule. 5/19/42 Tr. 460. One member hypothesized that the language was suggested by "[o]ne of the members of the Subcommittee on Style." *Ibid.* (Holtzoff). In the Committee's view, the object of a motion to quash was to relieve the movant "of the oppressive character of a subpoena, of calling for the production of several carloads of books, papers, and records"; on the other hand, "the determination of the admissibility" was "something new." *Ibid.* (Dean).

[13] See *United States* v. *Gibbons*, 607 F.2d 1320, 1328 (10th Cir. 1979); *United States* v. *Beasley*, 550 F.2d 261, 266 (5th Cir.), cert. denied, 434 U.S. 863 (1977); *United States* v. *Fisher*, 455 F.2d 1101, 1104-1105 (2d Cir. 1972); *In re Eight Grand Jury Subpoenae Duces Tecum*, 701 F. Supp. 53, 55 (S.D.N.Y. 1988).

[14] See *In re Wood*, 430 F. Supp. 41, 47 (S.D.N.Y. 1977); *United States* v. *Doe*, 341 F. Supp. 1350, 1352 (S.D.N.Y. 1972).

[15] See, *e.g.*, *Brown* v. *United States*, 245 F.2d 549 (8th Cir. 1957).

court may properly grant a Rule 17(c) motion to quash. Conversely, however, allegations of "no conceivable relevance" that fall short of genuine grand jury abuse cannot justify an order quashing a subpoena—even if the subpoena is quite broad or seeks materials that have no obvious connection with criminal conduct. See, *e.g.*, *In re Grand Jury Subpoenas Duces Tecum Addressed to Certain Executive Officers of M.G. Allen & Assoc.*, 391 F. Supp. 991, 1008 n.8 (D.R.I. 1975); *In re Grand Jury Subpoenas Duces Tecum Addressed to Corrado Bros.*, 367 F. Supp. 1126, 1132 (D. Del. 1973).[16]

4. The Third Circuit, joined more recently by the Tenth Circuit, has not followed the principles set forth above. Instead, those courts have required the government, in the first instance, to justify a subpoena duces tecum on relevance grounds. See *In re Grand Jury Proceedings (Schofield II)*, 507 F.2d 963 (3d Cir.), cert. denied, 421 U.S. 1015 (1975); *In re Grand Jury Proceedings (Schofield I)*, 486 F.2d 85, 92-93 (3d Cir. 1973); *In re Grand Jury Subpoena Duces Tecum Issued on June 9, 1982*, 697 F.2d 277, 281 (10th Cir. 1983). In *Schofield I*, the Third Circuit, exercising its "supervisory power," required the government to make a preliminary showing, by affidavit, that each item requested by the grand jury is "at least relevant to an investigation being conducted by the

[16] Of course, a subpoena recipient cannot make out a claim of "no conceivable relevance" on the strength of merely conclusory allegations. *In re Grand Jury Investigation (Jackson)*, 696 F.2d 449, 451 (6th Cir. 1982). See also *Universal Mfg. Co.* v. *United States*, 508 F.2d 684, 685 (8th Cir. 1975). Cf. *United States* v. *Johnson*, 319 U.S. at 512-513. In order to justify further inquiry into the matter by the court, a subpoena recipient must make a substantial showing from which the court can conclude that the subpoena is improper. Cf. *Franks* v. *Delaware*, 438 U.S. 154, 155, 170, 171 (1978).

grand jury and properly within its jurisdiction, and is not sought primarily for another purpose." 486 F.2d at 93.[17]

By requiring the government to make a preliminary showing of relevance, the Third Circuit's "Schofield" rule violates this Court's injunction that grand jury proceedings not be interrupted by procedural detours. Under the "Schofield" rule, the government in each case involving a grand jury subpoena duces tecum must identify the nature of the grand jury investigation and explain how the subpoenaed materials would be relevant to that investigation. Apart from the inevitable delay, such preliminary showings needlessly compromise "the indispensable secrecy of grand jury proceedings," *United States* v. *Johnson*, 319 U.S. at 513, and afford grand jury targets a form of premature discovery nowhere contemplated by the Rules of Criminal Procedure.

Besides being inconsistent with the principles of grand jury procedure set forth in this Court's decisions, the "Schofield" rule finds no support in the language or policies underlying Rule 17(c). The "Schofield" rule therefore cannot be justified either as a construction of

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[17] Most circuits have rejected the Third Circuit's "Schofield" rule. See *In re Grand Jury Proceedings (85 Misc. 140)*, 791 F.2d 663, 665 (8th Cir. 1986); *In re Sinadinos*, 760 F.2d 167, 169 (7th Cir. 1985); *In re Grand Jury Subpoena (Battle)*, 748 F.2d at 330 (Sixth Circuit); *In re Grand Jury Proceedings (Bank of Nova Scotia)*, 691 F.2d at 1387 (Eleventh Circuit); *In re Pantojas*, 628 F.2d 701, 704-705 (1st Cir. 1980); *In re Liberatore*, 574 F.2d at 83 (Second Circuit); *In re Grand Jury Proceedings (Hergenroeder)*, 555 F.2d at 686 (Ninth Circuit). See also *Schofield II*, 507 F.2d at 968 (Adams, J., concurring) (the "Schofield" rule "seem[s] to undercut the holding by the Supreme Court in *Dionisio*"); *id.* at 969 (Aldisert, J., dissenting) (the "Schofield" rule constitutes a "major deviation" and "radical departure" from the holding in *Dionisio* that "no preliminary showing by the government is required").

Rule 17(c) or as an extension of the common law of grand jury procedure.

Finally, the "Schofield" rule cannot be justified as an exercise of the court's "supervisory power," the source of authority that the Third Circuit invoked when it created the rule. Courts may not use the supervisory power to create a rule that is contrary to statute or court rule. See *Bank of Nova Scotia* v. *United States*, 487 U.S. 250, 254-256 (1988); *United States* v. *Hasting*, 461 U.S. 499, 505-507 (1983). And the supervisory power is not an excuse to disregard the balance of interests already defined by this Court in constitutional rulings. See *United States* v. *Payner*, 447 U.S. 727, 734-736 (1980). Moreover, a court's exercise of the supervisory power, which is normally confined to formulating rules to govern proceedings before it, cannot lightly be invoked to direct the functioning of an investigative entity whose independent status is expressly recognized in the Fifth Amendment. See *United States* v. *Chanen*, 549 F.2d 1306, 1313 (9th Cir.), cert. denied, 434 U.S. 825 (1977); *United States* v. *Pabian*, 704 F.2d 1533, 1536-1537 (11th Cir. 1983); Beale, *Reconsidering Supervisory Power in Criminal Cases: Constitutional and Statutory Limits on the Authority of the Federal Courts*, 84 Colum. L. Rev. 1433, 1458-1462 (1984).

5. Like the rule in the Third and Tenth Circuits, the Fourth Circuit's decision in the present case imposes a threshold obligation on the government to establish the relevance of the subpoenaed records. But the decision below goes well beyond the Third and Tenth Circuit precedents. To satisfy the court of appeals' standard, the government must prove that the requested documents are relevant not merely to the grand jury's investigation, but also to the likely charges at trial. No other court of appeals

has taken so restrictive a view of the grand jury's subpoena power.[18]

The court of appeals' decision violates each of the three principles governing the role and responsibility of the grand jury. First, the decision holds the grand jury to the same standards of relevance and admissibility that apply at trial.[19] In the court's view, "any documents subpoenaed under Rule 17(c)"—whether subpoenaed by a grand jury during its investigation, or subpoenaed by the government after indictment and in preparation for trial—"must be admissible as evidence at trial" (Pet. App. 10a). Applying that standard, the court quashed the subpoenas to R. Enterprises and MFR, concluding that evidence of activities outside of Virginia "would most likely be inadmissible on relevancy grounds at any trial that might occur." *Ibid.* That standard ignores the distinction between the grand

[18] In contrast to the court below, the Third Circuit requires only a modest showing of relevance. For example, in *In re Grand Jury Empanelled Oct. 18, 1979 (Hughes)*, 633 F.2d 282 (1980), the court found that the government had demonstrated the relevance of documents subpoenaed by the grand jury when it represented, by affidavit, that "the grand jury was conducting an investigation into specific federal crimes," that the requested documents would be relevant to that investigation, and that the information was not sought for an unrelated purpose. *Id.* at 287. The court noted that even a "cryptic" affidavit may satisfy the government's obligation under *Schofield I*. *Ibid.* See also *In re Grand Jury Proceedings (Schofield II)*, 507 F.2d at 967.

[19] The court of appeals construed Rule 17(c) in the grand jury context as if the "admissibility" language deleted by the Advisory Committee had in fact been adopted. But the language was deliberately eliminated; and "[f]ew principles of statutory construction are more compelling than the proposition that [a legislative committee] does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language." *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 442-443 (1987). See generally *Fox* v. *Standard Oil Co.*, 294 U.S. 87, 96 (1935).

jury and trial settings, and it imposes on the grand jury process a rule of relevance that has no place in the investigative context.[20]

[20] The court of appeals' reliance on *United States* v. *Nixon*, 418 U.S. 683 (1974), reflects its failure to distinguish grand jury proceedings from the trial on the merits. The *Nixon* case was plainly concerned only with *trial* subpoenas—in particular, a trial subpoena issued by the Watergate special prosecutor. See, *e.g.*, *id.* at 698-699 (the "chief innovation" of Rule 17(c) subpoenas is the fact that they "expedite the trial by providing a time and place before trial for the inspection of subpoenaed materials") (emphasis omitted); *id.* at 699 (articulating the prerequisites for obtaining materials "prior to trial") Indeed, in deciding to order the release of the subpoenaed records, the Court in *Nixon* described as "[t]he most cogent objection" to production the contention that the records were "a collection of out-of-court statements" and were "therefore inadmissible hearsay." *Id.* at 700. Hearsay objections, of course, have no application within the grand jury. See *Costello* v. *United States*, 350 U.S. 359 (1956).

Equally mistaken was the court of appeals' suggestion that, without a strict standard of relevance under Rule 17(c), grand jury subpoenas might be used as "a means of discovery in addition to that provided by Fed. R. Crim. Pro. 16." Pet. App. 9a. Rule 16 provides the government with reciprocal discovery rights, but only in connection with the trial process. Thus, Rule 16(b)(1)(A) permits the government to discover from the defendant documents and tangible objects "which the defendant intends to introduce as evidence in chief at the trial." Similarly, Rule 16(b)(1)(B) authorizes the discovery of reports of examinations and tests "which the defendant intends to introduce as evidence in chief at the trial or which were prepared by a witness whom the defendant intends to call at the trial when the results or reports relate to that witness' testimony." In short, the government's right to discovery under Rule 16 is triggered only after indictment (and, for that matter, only after the defendant has made his own discovery request under Rule 16 and the government has complied with that request, see Rule 16(b)(1)). If, as the court below supposed, Rule 17(c) forbids the grand jury to obtain materials that would otherwise be subject to Rule 16, there would be no means for the grand jury to secure such evidence at all, prior to the issuance of an indictment.

Second, the "trial relevance" standard adopted by the court of appeals depends on the outcome of the grand jury's work—who will be charged as defendants, and what the charges will be. But until the grand jury completes its investigation—and issues an indictment, if it so chooses—a court cannot know whether there will even *be* a trial, let alone what materials will be relevant at any such trial. See *Blair* v. *United States*, 250 U.S. 273, 282 (1919). The outcome of a grand jury investigation is often difficult to predict at the beginning or in the middle. A standard that depends on the outcome of the investigation is therefore unworkable as applied to decisions that must be made early in the process. To paraphrase one of this Court's administrative subpoena cases, a district court should not condition enforcement of a grand jury subpoena upon the grand jury's "first reaching and announcing a decision on some of the issues in [its] * * * proceeding." *Endicott Johnson Corp.* v. *Perkins*, 317 U.S. at 509.

Moreover, a standard of trial relevance disregards the principle that a grand jury's inquiry may be based entirely on general suspicion and may begin without any particular offense as its object. As this Court has noted, the grand jury "does not depend on a case or controversy for power to get evidence but can investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not." *United States* v. *Morton Salt Co.*, 338 U.S. 632, 642-643 (1950). See also *United States* v. *Bisceglia*, 420 U.S. 141, 147-148 (1975); *United States* v. *Powell*, 379 U.S. 48, 57 (1964). A requirement of trial relevance is obviously misplaced in a setting in which there may not be any clearly developed theory of criminality against which the question of trial relevance can be measured.

Finally, by affording targets a ready vehicle for challenging subpoenas—one that requires the government

to show relevance and admissibility—the court of appeals has created a new means for delaying grand jury investigations. Targets of a grand jury investigation ordinarily have every incentive to disrupt or delay the investigation, particularly since ligitation-related delays do not toll the running of the statute of limitations. In addition, targets have an interest in obtaining information about the government's case. Indeed, trial practice guides for defense counsel specifically refer to the tactical advantages of grand jury motions that result in delays and disclosures of information.[21] This Court's cases, however, strongly counsel against measures that would permit such "undue interruption [of] the inquiry instituted by a grand jury." *Cobbledick* v. *United States*, 309 U.S. 323, 327 (1940). To hold otherwise, this Court has observed, would "make of the grand jury a pawn in a technical game instead of respecting it as a great historic instrument of lay inquiry into criminal wrongdoing." *United States* v. *Johnson*, 319 U.S. 503, 512 (1943).

6. In their brief in opposition to the certiorari petition in this case, respondents defended the court of appeals' novel standard on First Amendment grounds. Br. in Opp. 6-10. The court of appeals, however, did not invoke First Amendment principles in quashing the subpoenas for respondents' business records. What the court said is that "any" record subpoenaed by the grand jury—whether or not related to First Amendment activity—"must be admissible as evidence at trial." Pet. App. 10a. The court of

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[21] See, *e.g.*, 1 A. Amsterdam, *Trial Manual for the Defense of Criminal Cases* § 172 (1984); 1 S. Allen, I. Rosen, D. Winston & K Kruskal, *Criminal Defense Techniques* § 6A.02[5] (1988); B. Gershman, *Prosecutorial Misconduct* §§ 2.1-2.9 (1985); National Lawyers Guild, *Representation of Witnesses Before Federal Grand Juries* § 13.4(b) (3d ed. 1985).

appeals' decision therefore sweeps broadly and is not confined in the way respondents suggested.

In any event, First Amendment principles do not support the court of appeals' decision—even if, as respondents have contended, the decision could be confined to subpoenas for records related to protected First Amendment activities. The First Amendment does not ordinarily protect routine corporate business records.[22] Although respondents assert that the business records subpoenas directed to them will "inevitably chill the exercise of free expression" (Br. in Opp. 9), they have offered no support for that prediction. And "[b]are allegations of possible first amendment violations are insufficient to justify judicial intervention into a pending investigation." *Dole* v. *Milonas*, 889 F.2d 885, 891 (9th Cir. 1989).

As this Court explained in *Branzburg* v. *Hayes*, 408 U.S. at 682, "the First Amendment does not invalidate every incidental burdening of the press that may result from the enforcement of civil or criminal statutes of general applicability." To the contrary, the Court has "held that generally applicable laws unconcerned with regulating speech that have the effect of interfering with

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[22] Cf. *In re A Witness Before the Special October 1981 Grand Jury (Manner)*, 722 F.2d 349, 352-353 (7th Cir. 1983) (grand jury subpoena for patient records of cancer treating foundation did not violate free association rights); *United States* v. *Coates*, 692 F.2d 629, 633-634 (9th Cir. 1982) (Internal Revenue Service summons for corporate minute books of a church results in only an incidental burden on religion and is therefore enforceable); *United States* v. *Grayson County State Bank*, 656 F.2d 1070, 1073-1074 (5th Cir. 1981) (IRS summons for bank records of a church did not impermissibly chill the exercise of religion), cert. denied, 455 U.S. 920 (1982); *United States* v. *Freedom Church*, 613 F.2d 316, 320 (1st Cir. 1979) (IRS summons to church pastor for books of account, bank records, and lists of contributors upheld against free exercise and free association claims).

speech do not thereby become subject to compelling-interest analysis under the First Amendment." *Employment Div., Dep't of Human Resources* v. *Smith*, 110 S. Ct. 1595, 1604 n.3 (1990).

For example, in *Branzburg* the Court held that the First Amendment does not shield a reporter from having to answer a grand jury's questions concerning an ongoing criminal investigation. Similarly, in *Zurcher* v. *Stanford Daily*, 436 U.S. 547 (1978), the Court held that the press does not enjoy a First Amendment immunity from search warrants issued upon a traditional finding of probable cause. See also *Arcara* v. *Cloud Books, Inc.*, 478 U.S. 697 (1986) (no special exemption for adult bookstore from municipal ordinance banning places of prostitution); *New York* v. *P.J. Video, Inc.*, 475 U.S. 868 (1986) (no special exemption for video store from the probable cause standard for search warrants); *Herbert* v. *Lando*, 441 U.S. 153 (1979) (no special exemption for the media from the general rules of pretrial discovery); *Citizen Publishing Co.* v. *United States*, 394 U.S. 131, 139-140 (1969) (no special exemption for the press from antitrust divestiture rules); *Oklahoma Press Publishing Co.* v. *Walling*, 327 U.S. 186 (1946) (no special exemption for newspaper publisher from subpoena issued by the Secretary of Labor); *Associated Press* v. *United States*, 326 U.S. 1 (1945) (no special exemption for the press from the antitrust laws); *Associated Press* v. *NLRB*, 301 U.S. 103 (1937) (no special exemption for the press from the labor laws).[23]

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[23] See also *SEC* v. *McGoff*, 647 F.2d 185 (D.C. Cir.), cert. denied, 452 U.S. 963 (1981) (upholding subpoena issued by the Securities and Exchange Commission for corporate records relating to transactions with South Africa); *In re Grand Jury Matter (Gronowicz)*, 764 F.2d 983, 989 (3d Cir. 1985) (Garth, J., concurring), cert. denied, 474 U.S. 1055 (1986).

A grand jury subpoena for corporate records is, likewise, a "generally applicable" order "unconcerned with regulating speech" and having, at most, "the effect of interfering with speech." Accordingly, the recipient of such a subpoena is not entitled to special protection under the First Amendment. *Employment Div., Dep't of Human Resources* v. *Smith*, 110 S. Ct. at 1604 n.3. First Amendment principles therefore do not support the court of appeals' requirement that the government establish trial relevance in order to sustain a grand jury subpoena.

C. Because Respondents Did Not Carry Their Burden Of Proof, The Grand Jury Subpoenas Should Have Been Enforced

In moving to quash the subpoena for corporate records in this case, respondent R. Enterprises asserted that it had done "absolutely no business in Virginia and [had] no contact with that state whatsoever," and that it would therefore be "a gross abuse of process to require that company to produce all of its records before a grand jury in the Easter[n] District of Virginia." C.A. App. A349 (6/28/88 Fahringer affidavit). See also 7/8/88 Tr. 2-3, 6; Resp. Br. in Opp. 5. Respondent MFR Court Street Books made much the same argument, alleging that it had done "no interstate business," and that the grand jury subpoena was therefore not "relevant to any obscenity investigation of criminal activity in the Eastern District of Virginia." C.A. App. 496, 499 (7/19/88 Schwarz affidavit). See also 8/12/88 Tr. 9-10; Br. in Opp. 5.

Those allegations do not demonstrate "that the information sought bears 'no conceivable relevance to any legitimate object of investigation by the federal grand jury.' " *In re Liberatore*, 574 F.2d 78, 83 (2d Cir. 1978). In the first place, the grand jury was not required to accept respondents' assertions on faith, but was instead entitled

to examine the evidence for itself. See *United States* v. *Morton Salt Co.*, 338 U.S. 632, 642-643 (1950). Respondents' challenge to the subpoenas required the trial court to prejudge the very matters that the grand jury was investigating—whether, and to what extent, respondents and their confederates were violating the obscenity laws within the Eastern District of Virginia and elsewhere. Allegations that can be confirmed or denied only by making "forecasts of the probable result of the investigation," *Blair* v. *United States*, 250 U.S. at 282, cannot constitute a sufficient showing of unreasonableness under Rule 17(c).

In any event, even if respondents transacted no business in Virginia, that would not render the subpoenaed records irrelevant to the grand jury investigation. At a minimum, the records might demonstrate a pattern of obscenity violations, including violations in other States, and thus constitute evidence of knowledge and intent on the part of Martin Rothstein (respondents' owner). As the district court found, Rothstein owned not only the respondent companies but also Model Magazine, which *did* conduct business in Virginia. See Pet. App. 60a; Fed. R. Evid. 404(b).[24] Alternatively, the out-of-state acts might con-

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[24] See *United States* v. *Jardina*, 747 F.2d 945, 952 (5th Cir. 1984) (evidence of counterfeit note-passing in Texas admissible to prove intent in prosecution for passing counterfeit notes in Louisiana), cert. denied, 470 U.S. 1058 (1985); *United States* v. *Bailleaux*, 685 F.2d 1105, 1110-1112 (9th Cir. 1982) (evidence of extortion in Oregon admissible to prove *modus operandi* and intent in prosecution for extortion in California); *United States* v. *Weaver*, 565 F.2d 129, 134 (8th Cir. 1977) (evidence of robbery of Arizona bank admissible to prove identity in prosecution for robbing bank in Arkansas), cert. denied, 434 U.S. 1074 (1978). See also *United States* v. *Nolan*, 551 F.2d 266, 270-271 (10th Cir.) (British conviction admissible to prove knowledge and intent in prosecution for importing narcotics from India to Kansas), cert. denied, 434 U.S. 904 (1977).

stitute overt acts in a conspiracy, properly chargeable in Virginia, involving Rothstein or Model Magazine.[25] Or, the out-of-state acts might prove that respondents or their principals aided and abetted obscenity violations committed in Virginia by either Rothstein or Model Magazine.[26]

In short, respondents did not carry their burden of proof under the appropriate standard: they did not show "that the information sought bears 'no conceivable relevance to any legitimate object of investigation by the federal grand jury.' " *In re Liberatore*, 574 F.2d 78, 83 (2d Cir. 1978). The decision of the district court denying respondents' motions to quash the subpoenas was therefore correct and should have been upheld on appeal.

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[25] See *United States* v. *Long*, 866 F.2d 402, 407 (11th Cir. 1989) (where several of defendant's co-conspirators committed overt acts in Alabama, defendant was properly convicted of conspiring within that State); *United States* v. *Meyers*, 847 F.2d 1408, 1411 (9th Cir. 1988) (where two of defendant's co-conspirators committed overt acts in Montana, defendant was properly convicted of conspiring in that State); *United States* v. *Scaife*, 749 F.2d 338, 346 (6th Cir. 1984) (where two of defendants' co-conspirators committed overt acts in the Western District of Tennessee, defendants were properly convicted of conspiring in that district); *United States* v. *Fahnbulleh*, 748 F.2d 473, 477 (8th Cir. 1984) (where two of defendant's co-conspirators committed overt acts in Arkansas, defendants were properly convicted of conspiring in that State), cert. denied, 471 U.S. 1139 (1985).

[26] See *United States* v. *Long*, 866 F.2d at 407-408 (defendant was properly convicted of aiding and abetting the possession of counterfeit obligations in Alabama, even though she never entered that State).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

EDWARD S. G. DENNIS, JR.
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JULY 1990

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No. 89-1436

In the Supreme Court of the United States

OCTOBER TERM, 1990

UNITED STATES OF AMERICA, PETITIONER

v.

R. ENTERPRISES, INC.,
AND MFR COURT STREET BOOKS, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

APPENDIX TO THE BRIEF FOR THE UNITED STATES

KENNETH W. STARR
Solicitor General
Department of Justice
Washington, D.C. 20530
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APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

IN RE: GRAND JURY 87-4, JOHN DOE 1094

ORDER

This matter came before the Court on the application to quash grand jury subpoenas duces tecum, and for reasons stated from the bench, it is hereby

ORDERED that the motion to quash subpoenas is DENIED, and the two subpoenas for business records are merged in accordance with the Court's oral ruling.

/s/ Claude M. Hilton
CLAUDE M. HILTON
United States District Judge

Alexandria, Virginia
June 17, 1988

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

GRAND JURY

IN RE: GRAND JURY 87-3, JOHN DOE 1094

ORDER

For reasons stated in open court, it is accordingly ORDERED:

(1) that in re: Application to Quash Grand Jury Subpoena Duces Tecum to R Enterprises, Inc., Jury 87-3, John Doe 1094, the Motion to Quash is DENIED. R Enterprises, Inc., d/b/a Coast to Coast Video, Inc., SHALL COMPLY with the Subpoena Duces Tecum.

(2) that the Clerk shall forward copies of this Order to all counsel of record.

/s/ James C. Cacheris
JAMES C. CACHERIS
United States District Judge

July 8, 1988
Alexandria, Virginia

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

Grand Jury No. 87-4

IN RE GRAND JURY INVESTIGATION, JOHN DOE 1092
(MFR Court Street Books, Inc.)

ORDER

This matter came before the Court on MFR Court Street Books, Inc.'s (MFR or movant) motion to quash a grand jury subpoena duces tecum, served on April 26, 1988, seeking production of MFR's business records.[1] MFR is a small retail bookstore located in Brooklyn, New York, and according to the affidavit of MFR's attorney, engages in no interstate business. MFR argues that it should not be required to produce its records because there has been no showing that the records are material or relevant to the grand jury's investigation of the distribution of obscene materials into the Eastern District of Virginia. In essence, MFR argues that the grand jury is conducting a fishing expedition in the hope that it may find some evidence of illegal activity on MFR's part. MFR also argues that its First Amendment interests outweigh any need the grand jury has for its business records.

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[1] The government orally modified items seven and eight of the subpoena to include only invoices generated as a result of doing business in the Eastern District of Virginia.

For the reasons stated from the bench and in this Order, the motion to quash is denied. Movant has not cited any persuasive authority indicating that the government must make a threshold showing that the business records sought are relevant to the grand jury's investigation. Nor has movant produced any convincing authority for the argument that the business records of a purveyor of sexually explicit materials should enjoy the same presumption of First Amendment protection as do the materials themselves.

Even assuming, *arguendo*, that the government must make a threshold relevance showing, it has amply done so here. The principal owner and operator of MFR is Martin Rothstein. Rothstein is also the principal of Model Magazine Distributors, Inc. (Model) and R. Enterprises, Inc., d/b/a Coast to Coast Video (R. Enterprises). Model has distributed obscene material into the Eastern District of Virginia. *United States v. Dennis E. Pryba, et al.*, Cr. 87-00208-A (E.D. Va. 1987). The three entities share the same location. According to the affidavit of FBI agent James Clemente, Rothstein, when informed that subpoenas were outstanding for all three entities, stated that, "It's all the same thing. I am the president of all three." Given Rothstein's acknowledgment of the interconnectedness of the three entities, MFR's records are relevant to the investigation into distribution of obscene materials into the Eastern District of Virginia and possible violations of the Racketeering Influenced and Corrupt Organizations Act. 18 U.S.C. §§ 1961 to 1963.

Prior proceedings relating to motions to quash by Model and R. Enterprises support the Court's denial of MFR's motion. On June 17, 1988, Judge Claude

M. Hilton of this District denied Model's motion to quash a subpoena identical to the one at issue here, and on July 8, 1988, Judge James C. Cacheris denied R. Enterprises' motion to quash another subpoena identical to the one at bar. *In re: Grand Jury 87-4, John Doe 1094* (E.D. Va. June 17, 1988) (Order); *In re: Grand Jury 87-3, John Doe 1094* (E.D. Va. July 8, 1988) (Order). Further, the subpoena in question is essentially similar to the one directed to Model in 1986 and upheld by the district court and approved by the Fourth Circuit in *In re Grand Jury Subponea: Subpoena Duces Tecum*, 829 F.2d 1291, 1295 (1987), *modified on other grounds*, 844 F.2d 202 (1988). While counsel for MFR disputes whether the validity of the subpoena for business records was fully briefed and addressed before the Fourth Circuit, the contrary appears. That court stated that the request for such records was "clearly delineated and not overly burdensome." *Id.* In sum, this Court concludes that, like the Model and R. Enterprises subpoenas, the MFR subpoena is valid.

Copies of this Order shall be issued to all counsel of record.

/s/ T. S. Ellis, III
T. S. Ellis, III
United States District Judge

Alexandria, Virginia
August 18, 1988

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

Grand Jury Nos. 87-3, 87-4

IN RE: GRAND JURY INVESTIGATION, JOHN DOES 1092, 1094 (R. Enterprises, Inc., Model Magazine Distributors, Inc. and MFR Court Street Books, Inc.)

ORDER

This matter came before the Court on the government's motion for an order to show cause why Model Distributors, Inc. (Model), R. Enterprises, Inc., d/b/a Coast to Coast Video (R. Enterprises), MFR Court Street Books, Inc. (MFR) and Martin Rothstein should not be held in contempt for failure to comply with the Court's orders of June 17, 1988, July 8, 1988 and the Court's oral ruling of August 12, 1988, denying Model's, R. Enterprises' and MFR's motions to quash grand jury subpoenas duces tecum. For the reasons stated from the bench, and it appearing to the Court that movants have raised no additional or meritorious grounds for resisting the subpoenas, it is hereby ORDERED:

1) That the government's motion is granted with respect to Model, R. Enterprises and MFR Court Street Books, Inc. Model has failed to comply fully with the subpoena issued on April 22, 1988 and modified on June 2, 1988. Model has also refused to produce videotapes in response to a second subpoena

issued on June 2, 1988. R. Enterprises has resisted compliance with a subpoena issued on June 27, 1988. MFR has failed to comply with a subpoena issued on April 22, 1988. The three entities have deliberately and contumaciously disregarded the Court's orders to produce the materials requested and are in contempt of this Court. A fine of $500 per day, dating from August 12, 1988, is imposed on each entity so long as its contemptuous conduct continues. Collection, but not accumulation, of fines is stayed until 5:00 p.m. on August 23, 1988, pending appeal of this matter. Contemnors may request an extension of this stay should the Court of Appeals be unable to hear this matter in the time permitted.

2) That, as to Martin Rothstein, the government's motion is held in abeyance pending the submission of further authorities on whether the Court has the power to order Rothstein's confinement under 28 U.S.C. § 1826. The Court will rule on the matter without further oral argument.

Copies of this Order shall be issued to all counsel of record.

/s/ T. S. Ellis, III
T. S. ELLIS, III
United States District Judge

Alexandria, Virginia
August 18, 1988

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Copy

No. 89-1456

In The

Supreme Court of the United States

October Term, 1990

UNITED STATES OF AMERICA,

Petitioner,

v.

R. ENTERPRISES, INC., AND
MFR COURT STREET BOOKS, INC.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF FOR THE RESPONDENTS

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QUESTION PRESENTED

When a subpoena, seeking records related to activities protected by the First Amendment, is challenged on grounds that compliance will arguably abridge free expression, must a prosecutor show the records will advance a "compelling state interest" and that there is a "substantial" relationship between the records sought and the grand jury investigation?

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MISCELLANEOUS

TABLE OF AUTHORITIES – Continued

STATEMENT OF THE CASE

On August 12, 1988 counsel for the respondents stood in the United States District Court in Alexandria, Virginia and argued in defense of a contempt proceeding that the subpoenas served upon MFR Court Street Books ("MFR"), a small bookstore in Brooklyn, New York, and R. Enterprises, a distributor of adult materials in Manhattan, should have been quashed. (629-649)[1] In detailed affidavits, (45 pages) and in argument, counsel pointed out that the retail bookstore in Brooklyn sold books to local customers and never did any business in Virginia. (494-514) The same was said of R. Enterprises, a distributor of adult material in Manhattan. (333-358; 466-489)

It was urged that documents demanded in the subpoenas were irrelevant to the grand jury's investigation and violated the respondents' rights under the First and Fourth Amendments, as well as Rule 17(c) of the Federal Rules of Criminal Procedure. As a consequence, it was said that the broad subpoenas constituted an abuse of the grand jury process. (349, 494-514) Counsel also argued that if these two small companies had to deliver all their papers to a grand jury in Virginia, it would have a chilling impact on the distribution of books and video-films presumptively protected by the First Amendment. (353, 354)

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[1] Page numbers followed by "a" refer to the Government's petition appendix. Those numbers without letters refer to the joint appendix filed in the United States Court of Appeals for the Fourth Circuit.

In response to these constitutional arguments the prosecutor said, in essence, we don't have to give any reasons why we are subpoenaing all of a company's records down here to Virginia. (649) And, perhaps, at that very moment this case was destined to reach this Court. The district court yielded to the Government's position and found MFR and R. Enterprises in contempt. (702-703) But the Fourth Circuit reversed their judgments of contempt and held that, because the Government had made no showing of how the books and records sought were relevant to the grand jury investigation, the subpoenas should be quashed under Rule 17(c). (8a-10a)

However, the long and tortured prior history of this case is most revealing and tells the Court something of the prosecutor's zeal in this "star-crossed" investigation. Thus, it may be helpful to trace this controversy back to its origin. The case actually began in October of 1986, when the government embarked upon an investigation of shipments into Virginia of video-tapes suspected of being obscene. The campaign was launched under the leadership of Henry Hudson, the former chairman of the Attorney General's Commission on Pornography, better known as the "Meese Commission," and now the United States Attorney for the Eastern District of Virginia.

The First Subpoena Issued to Model Demanded Approximately 2,000 Video-tapes And Over 400,000 Documents.

The prosecutor issued a subpoena to Model Magazine Distributors, Inc. ("Model") a New York corporation, that distributes adult material. (243-244, 21a-23a) The subpoena called for the production of over 2,000 video-tapes and virtually all of its business records – totalling over 400,000 documents! (19, 200, 336) In response to the subpoena Model delivered to the Virginia grand jury all of its papers that were in any way related to Virginia.[2] (15-19) However, it declined to produce the 2,000 video-tapes and the 400,000 documents related to sales in New York and other eastern states. To have complied with these subpoenas would have brought a complete halt to Model's circulation of magazines and video-tapes. (212, 213)

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[2] Model ultimately produced: (1) all of its tax returns for the years 1980 through 1985; (2) all of its records of sales and shipments to firms in Virginia; (3) all records of its shipments to B & D Corporation in Maryland; (4) Model stock certificates and corporate minute books; and, (5) a listing of all its assets; all lease agreements; stock redemption agreements; and records of loans made. It also advised the Government that it had no consulting agreements or expense records covering travel and entertainment in the state of Virginia. (15-19; 118-119; 624-626; 669)

Model Stops Doing Business In Virginia Because Of The Grand Jury Investigation And The Demand For All Its Records.

In October of 1986, because of the prosecutors actions, Model suspended all shipments of video-tapes, paperback books, and magazines into Virginia. (13, 673) Model's distribution of merchandise into Virginia was halted not because it believed the materials were unlawful, but simply to avoid the legal expense of a continuing investigation. (13, 673)

Model moved to quash the subpoena, setting forth in elaborate detail why, under this Court's decisions, the subpoena was overbroad. The motion was denied, Model was held in contempt, and an appeal was taken to the Fourth Circuit. (243) On September 24, 1987, the Fourth Circuit reversed the judgments of contempt because the subpoenas were impermissibly vague and overbroad. (241-257; 19a-56a) *In re Grand Jury Duces Tecum (Model I)*, 829 F.2d 1291 (4th Cir. 1987) On November 6, 1987, the Government filed a petition for rehearing together with a suggestion for rehearing *in banc*. That application was denied on April 19, 1988.[3] (19a-56a; 16a-18a). No further review of the Fourth Circuit's decision in *Model I* was sought.

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[3] In denying the Government's petition for rehearing, the court confined its "holding" to the impermissible vagueness and overbreadth of the "lascivious, lustful, and lewd" terminology in the subpoena, but the court did not withdraw its earlier panel opinion. 844 F.2d at 203. The Fourth Circuit did not reach the question of the relevancy of business records in this earlier case.

The Prosecutor Demands Virtually All Of The Records Of A Retail Bookstore In Brooklyn And A Distributor Of Adult Materials In Manhattan.

Despite Model's stopping all shipments into Virginia the prosecutor, on April 26, 1988, struck again with a new barrage of subpoenas, directed not only to Model, but also to MFR and R. Enterprises. MFR is a small retail bookstore located in Brooklyn, New York. (506) It is a New York corporation and occupies a store that is approximately 15 feet wide and 45 feet deep. (512) It sells paperback books, magazines and video tapes to adults in downtown Brooklyn. It has never engaged in any interstate business in Virginia or for that matter any other state. (62, 341-342, 495, 496, 512)

R. Enterprises is a New York corporation that distributes adult material. (342) It commenced doing business under the trade name of "Coast-To-Coast Video" in May of 1985. (471, 508, 518, 519) R. Enterprises and MFR are both owned by Martin Rothstein. (122, 472) However, neither company has ever shipped any merchandise into the State of Virginia. MFR Books, R. Enterprises and Model are separate and distinct corporations and file separate corporate tax returns. (620, 637, 638) The Government has never produced any evidence from any source – confidential informants or otherwise – that R. Enterprises, Inc., or MFR ever engaged in any business in Virginia. (620, 637-638)

The subpoenas served upon MFR and R. Enterprises required the production of virtually all of their business records before a Federal grand jury in Virginia. (70a-74a;

79a-82a) The prosecutor demanded for a four year period: *all* their canceled checks; bank statements; and check books; *all* records of loans and mortgages received and given by the corporation; and *all* financial statements. (359-361, 515-517)

Also demanded were *all* of the respondents' corporate contracts and lease agreements; *all* records relative to the acquisition or sale of real-or-leasehold property, including purchase contracts, settlement sheets, contracts of sale, deeds, mortgages, deeds of trust and correspondence, memoranda, notes or meetings, and/or telephone calls relating to or connected in any way with the acquisition or sale of property. (360, 361, 516, 517)

The United States Attorney also insisted upon delivery to the grand jury of all records of purchases of inventory and goods held for resale, including, but not limited to, invoices from vendors, records of receipts and records of material returned to the supplier; *all* records relating to travel and entertainment expenses paid by or incurred on behalf of the corporations; and finally all records of investments made by or on behalf of the corporations. (360, 361; 516-517)

The respondents were forced to file a second set of motions to quash on the grounds that there was no showing of how these records were *relevant* to the grand jury's ostensible investigation of the sale of obscene materials in Virginia. These applications were supported by verified facts indicating that the records requested could not possibly be related to a grand jury's inquiry in Virginia. The affidavits spelled out that R. Enterprises had never:

> " . . . sold to anyone in the state of Virginia; they had never shipped, transported or sent by carrier into the state of Virginia any merchandise of any kind. Furthermore, it has never purchased any materials from Virginia. And finally R. Enterprises has no customers of any kind in the State of Virginia." (194-224, 342)

An Affidavit filed on behalf of MFR stated essentially the same thing. (494-514) Both MFR and R. Enterprises declared that the delivery of all their records to a grand jury in Virginia would constitute an abuse of the grand jury process and would be unconstitutional.[4] (349, 494-514) MFR and R. Enterprises also averred that to produce all their records would impose a prior restraint on materials "presumptively protected" by the First Amendment. (352-358) It was stated in the affidavits that the business records were inextricably intertwined with the materials sold and further once their customers learned that they were the subject of a grand jury investigation in Virginia, they would no longer continue to do business with them. (352)

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[4] The Government's brief tries to make it sound as though R. Enterprises and MFR assertions of lack of connection to Virginia are conclusory and therefore the prosecutor was not obliged to accept the statement. (Gov. Brf. pp. 30, 31) However, it should be plain that MFR's intrastate activities and R. Enterprises lack of connection to Virginia are supported by *facts* contained in sworn affidavits. (A 62-63, 342-343, 494-497, 506-510, 620, 637-639) We don't know how it can be said that a company does not do business in another state except by saying it in the most direct way. However, in sharp contrast to the affidavits provided by respondents, the Government never contested these facts and the Fourth Circuit, in its opinion, pointed out that the prosecutor never even *"alleged"* that the respondents did business in Virginia. (620, 637-38, 8a)

Q: "What would you expect to find in MFR's business records?"
A: "I'm not sure your honor. I don't know."

At one point in the proceedings Judge Ellis asked of the prosecutor, "What would you expect to find in MFR's business records?" And the prosecutor understandably answered: "I'm not sure your honor. I don't know." (645) The prosecutor took the position the Government did not have to demonstrate any relevancy.[5] (85, 408, 472-474, 523, 649) The motions to quash were denied and on August 12, 1988, MFR and R. Enterprises were held in contempt. (702, 703)

Once again respondents were compelled to seek relief in the Fourth Circuit, and on August 31, 1989, that court vacated the contempt convictions for MFR and R. Enterprises. (1a-15a) It reversed the contempt judgment against Model for the 193 video-tapes on the grounds that the prosecutor made an insufficient showing of how it

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[5] The Government claims that Mr. Rothstein admitted to an FBI agent that "R. Enterprises, MFR books, and Model were all the same thing." (Gov. Brf. at 3) However, the prosecutor has omitted a crucial portion of the quotation of the FBI agent making it sound as if Mr. Rothstein said that all three companies were engaged in the same business. When Martin Rothstein was served with the three subpoenas for Model, R. Enterprises and MFR, the FBI agent alleges that Mr. Rothstein accepted service with the statement: "It's all the same thing, I am the president of all three." (401) He never said that all the three companies are one and the same. While Mr. Rothstein owned all three corporations, it is clear that these were three separate corporations engaged in completely different business activities. (506-510, 637-638)

was believed that the videotapes were obscene. However, it upheld that subpoena requiring Model to produce certain of its business records before the grand jury.

The Fourth Circuit Decision

When the Fourth Circuit undertook consideration of the MFR and R. Enterprises subpoenas, it was, of course, the *second* time the case was before it. The first time the court was forced to quash a subpoena that demanded close to 2,000 video-tapes. On this second occasion the court was confronted with the same prosecutor seeking virtually all the records of a small retail bookstore in Brooklyn and a distributor of adult material in Manhattan. The court stressed, "Our only concern with respect to the business records requested from Model, R. Enterprises and MFR is the relevancy of those documents to the grand jury's investigation." (7a) The court went on to point out that the prosecutor never made any allegation or produced any proof that the books and records sought were in any way relevant to the grand jury investigation in Virginia.

The court then concluded that in the absence of any showing "linking MFR or R. Enterprises with the Eastern District of Virginia" the motion to quash would have to be granted.[6] The court emphasized that to permit this

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[6] The Fourth Circuit went on to emphasize: "The Government does not allege, and the record contains absolutely no evidence indicating, that either MFR or R. Enterprises has ever

(Continued on following page)

expansive official action to go unabated would allow a "fishing expedition" into the affairs of New York firms in hope that something would turn up. The court went on to hold that "any documents subpoenaed under Rule 17 (c) must be admissible as evidence at trial." (10a) The court indicated that the materials sought would "most likely" be inadmissible at any trial that might occur. (10a)

The Government has mischaracterized the decision below as requiring the Government to make a "threshold showing" of relevance (Gov't. Br. at 23). This language does not appear anywhere in the holding of the Fourth Circuit. The court was careful to point out that the obligation of the Government to demonstrate relevance only becomes operative *after* the recipient of the subpoena shows that the records sought are not relevant to the grand jury's investigation.

(Continued from previous page)

shipped materials into, or otherwise conducted business, in the Eastern District of Virginia. The district court found that the business records of these two companies were relevant to the investigation of Model because MFR, R. Enterprises and Model are all owned by the same individual, Martin Rothstein. The lower court apparently believed that Rothstein's ownership of three companies, in connection with the evidence demonstrating that Model shipped allegedly pornographic material into the Eastern District of Virginia, gives rise to an inference that MFR and R. Enterprises also transacted business in that location. In the absence of any evidence linking MFR and R. Enterprises with the Eastern District of Virginia, however, such an inference is arbitrary at best." (8a, 9a)

SUMMARY OF ARGUMENT

When New York distributors of materials protected by the First Amendment challenged subpoenas demanding all their records before a grand jury in Virginia, must the prosecutor make *some* showing of how those records are relevant to the grand jury investigation? That is truly the issue that brings us to this Court and it calls radically into question our deepest assumptions concerning the protections of the First Amendment and a citizen's right to privacy under the Fourth Amendment. The prosecutor, in the courts below, has steadfastly maintained that he is not obliged to make *any* showing of relevance. His stance constitutes a radical departure from well-established methods of investigating materials guarded by both the First and the Fourth Amendments. He is simply wrong. And here, briefly are the reasons why.

It is well-established that the Government is not free to adopt whatever procedures it pleases in investigating obscenity without regard to the possible consequences for constitutionally protected speech. And that is because free expression is "vulnerable to gravely damaging yet barely visible encroachments."[7] Here, the Government's investigation centered on the shipment into Virginia of video-tapes that are presumptively protected by the First Amendment. This Court has repeatedly recognized that investigative techniques that are suitable in routine criminal cases may be unacceptable when applied to an official inquiry concerning books and films. As a consequence, the Court has refused to allow prosecutors the freedom of investigation normally applied to drugs or other forms of "contraband" because of the consequences such action may have on the exercise of free speech.

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[7] *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 66 (1963).

Thus, when a retail bookstore in Brooklyn and R. Enterprises in Manhattan, objected to the subpoenas demanding all their records before a grand jury in Virginia, the special rules pertaining to First Amendment cases were fully applicable. And one of those special rules requires that the prosecutor show that there is a "compelling state need" for the books and records sought and that they are "substantially" related to the grand jury's investigation. To invoke this rule, that has such strong roots in our constitutional tradition, MFR and R. Enterprises only had to present a prima facie showing of arguable First Amendment infringement. And that they did.

The Government says that the protections of the First Amendment do not apply to routine corporate records. But once again, they are wrong. It does. Business records enjoy the comprehensive protections provided by the First and Fourth Amendments and those safeguards cannot be avoided by the simple expedient of a subpoena. A grand jury subpoena for all of a company's records carries an obvious threat of prosecution that is just as chilling to a distributor of adult material as the subpoenaing of the videotapes.

That is because the real source of the chill is the *threat* of imminent prosecution, and that fear exists whether the demand is for a single copy of a film or the demand for *all* of a company's list of customers and suppliers. Both can have an equally chilling effect upon the exercise of First Amendment rights. Once suppliers know that a customer is under criminal investigation, they will understandably be reluctant to ship merchandise, recognizing that they may be exposing themselves to a far-off criminal investigation. That is why the law requires a showing of a "compelling interest" and a "substantial" connection to the investigation. In virtually every reported case, we have reviewed, the government has

been able to meet that test and the grand jury investigations have gone forward.

No one is urging that MFR or R. Enterprises' corporate records are immune from a grand jury subpoena. But, before they can be subjected to such broad and expansive demands that will chill the exercise of free expression, there must be a "substantial" showing of how it is their records are relevant to a grand jury investigation in the state of Virginia. Such a requirement does not impose an unbearable burden upon a prosecutor but at the same time it affords dealers in videotapes the reasonable protections provided by the First Amendment. But to suggest that they need make *no showing at all* is an idea that we hope this Court could never support.

And finally, even if this case were not governed by First Amendment principles, the subpoenas were properly quashed on Fourth Amendment grounds and under the authority of Rule 17(c). Under both the Fourth Amendment and Rule 17(c), when a person challenges a subpoena on relevancy grounds, a prosecutor is required to furnish some indication how it is the records are relevant. There must be some mechanism by which these two competing interests – the people's right of privacy and the Government's right to investigate suspected crimes can be balanced. Although it is assumed that the powers of the prosecutor, exercised through the grand jury, will result in earnest inquires, experience has taught us that they can become abusive and overzealous.

Today, in this Court, the Solicitor General acknowledges that the powers of a grand jury are not unlimited. And they are also willing to agree that once a person challenges a grand jury subpoena claiming that the records sought have "no conceivable relevance" to the grand jury's investigation, the prosecution is obliged to make some showing of

relevance. But such an unrealistic standard would, for all practical purposes, eliminate completely the relevance requirement established by earlier decisions of this Court and is constitutionally unacceptable.

A person objecting to a subpoena on Fourth Amendment grounds should only have to make a "reasonable" showing of a lack of relevance. Once that threshold showing is made, then, and only then, must the Government come forward with some assurance that the evidence they seek is relevant to the inquiry – which is precisely what the Fourth Circuit held. And, of course, the showing of relevancy may be "minimal" and, where necessary, it may be furnished to the court *in camera*. But, such "minimal" assurances are indispensable, if the people are to be afforded the protections contemplated by the Fourth Amendment and by Rule 17(c). This practical rule has been applied by other circuit courts that have addressed this specific issue.

To allow a prosecutor unlimited authority on issuing subpoenas for any and all records that suit his fancy would be an open invitation to a serious abuse of that power. And, it bears repeating that prosecutors will not be prejudiced by these requirements because in virtually every case cited both by the Government and the respondents, prosecutors have been able to satisfy district judges why and how the evidence sought was relevant to the grand jury investigations. Through the prudent use of subpoenas or the judicious employment of search warrants, people accused of violating the federal and state obscenity laws have been regularly brought to justice. By following these procedures, the public's right to read and see what they please has been protected and at the same time, the Government's ability to prosecute crime has not been unduly impaired. In few words that is what is at issue in this case and why the judgment of the Fourth Circuit should in all respects be affirmed.

ARGUMENT

I

WHEN A SUBPOENA, SEEKING RECORDS RELATED TO ACTIVITIES PROTECTED BY THE FIRST AMENDMENT, IS CHALLENGED ON GROUNDS THAT THE DOCUMENTS SOUGHT ARE NOT RELATED TO THE GRAND JURY INVESTIGATION, THE GOVERNMENT MUST MAKE A SUBSTANTIAL SHOWING THAT THE RECORDS ARE RELEVANT.

It is well-established that a state "is not free to adopt whatever procedures it pleases [in investigating obscenity] without regard to the possible consequences for constitutionally protected speech," because free expression is "vulnerable to gravely damaging yet barely visible encroachments." *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 66 (1963). Certainly this time-honored principle needs no scholarly vindication. For in an unbroken series of cases extending over a long stretch of this Court's history, it has been held postulate that freedom of expression enjoys a very special place in our hierarchy of constitutional values.[8] Investigative techniques that impinge on the First Amendment rights of distributors of books and films have been consistently condemned by the Court.

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[8] *New York v. P.J. Video*, 475 U.S. 868 (1986); *Walter v. United States*, 447 U.S. 649 (1980); *Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319 (1979); *Heller v. New York*, 413 U.S. 483 (1973); *Roaden v. Kentucky*, 413 U.S. 496 (1973); *Lee Art Theater, Inc. v. Virginia*, 392 U.S. 636 (1968); *Freedman v. Maryland*, 380 U.S. 51 (1965); *A Quantity of Books v. Kansas*, 378 U.S. 205 (1964); *Marcus v. Search Warrant*, 367 U.S. 717 (1961).

Under the First Amendment, the Government can not investigate obscenity charges in a manner that will impermissibly chill the exercise of free speech rights, even if the same investigative strategies would be acceptable in other routine criminal cases. *Bantam Books, Inc. v. Sullivan*, 372 U.S. at 66. In fact, this Court has repeatedly recognized that investigative methods that are suitable in most criminal cases may impermissibly chill First Amendment rights when applied to the cases involving books and films. *See Marcus v. Search Warrant*, 367 U.S. 717, at 730-31; *A Quantity of Copies of Books v. Kansas*, 378 U.S. 205; *New York v. P.J. Video, Inc.*, 475 U.S. 868.

The potential for curtailing the distribution of books and films that results from seizures is equally applicable to a prosecutor's attempt to subpoena records that are inextricably related to the distribution of materials protected by the First Amendment. As the Fourth Circuit said so well in this very case: "The chilling effect of such sweeping and indiscriminate uses of the subpoena power is anything but fanciful; it is altogether real."[9] (12a) The same principle applies whether the actual films are subpoenaed or the business records essential to the distribution of those films are demanded.

It is equally well-settled that the "exercise of the power of compulsory process [must] be carefully circumscribed when the investigative process tends to impinge

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[9] We realize the court used the quoted language when discussing the Government's demand for Model's 193 videotapes. But as we shall point out later the spirit of these words apply equally to the subpoenaing of all of a company's books and records.

upon such highly sensitive areas as freedom of speech or press, freedom of political association, and freedom of communication of ideas. . . . " *Sweezy v. New Hampshire*, 354 U.S. 234, 245 (1957). And where a subpoena impinges upon First Amendment rights, the Government must show a "substantial relation" between the information sought and the subject of a "compelling state interest." *Gibson v. Florida Legislative Investigation Committee*, 372 U.S. 539, 546 (1963) *See also N.A.A.C.P. v. Alabama*, 357 U.S. 449, 78 S. Ct. 1163 (1958); *N.A.A.C.P. v. Button*, 371 U.S. 415, 83 S.Ct. 328 (1963). This Court has also stressed, Fourth Amendment standards of reasonableness and specificity must "be applied with scrupulous exactitude" when a person's rights under the First Amendment are at issue. *Zurcher v. Stanford Daily*, 436 U.S. 547, 564 (1978)

The "Compelling Interest" Test

In 1972 this Court recognized the "compelling interest test" when considering challenges made to grand jury subpoenas that were claimed to intrude upon a reporter's privilege. In *Branzburg v. Hayes*, 408 U.S. 665 (1972), the Court found that in each case under consideration, the test of "a substantial relation between the information sought and a subject of overriding and compelling state interest" had been satisfied. 408 U.S. at 700, 701. The Court sustained the grand jury subpoenas because the Government established that the information sought

related "directly" to the criminal conduct being investigated. 408 U.S. at 701, 708.[10]

Circuit courts have faithfully followed the rule discussed in *Branzburg*[11]. When grand jury investigations conflict with the exercise of First Amendment rights, the Government has the burden of establishing that ". . . . its interests are legitimate and compelling and the incidental infringement upon First Amendment rights is no greater than is essential to vindicate its subordinating interests."

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[10] The Court did point out in *Branzburg*: "If the test is that the Government 'convincingly show a substantial relation between the information sought and a subject of overriding and compelling state interest' [citing *Gibson* and other authorities]" to justify even an indirect burden on First Amendment rights – it was quite apparent the Government had met that burden. 408 U.S. at 700. Certainly nothing was said in *Branzburg* that indicates this Court is ready to withdraw from the rule celebrated in the impressive line of First Amendment cases housed in footnote 18 of *Branzburg*.

[11] *In re Faltico*, 561 F.2d 109 (8th Cir. 1977) the Eighth Circuit was confronted with a subpoena that commanded the production of the records relating to the membership of a trade association. The association complained that this demand violated their rights under the First Amendment. The court, applying the "compelling interest," test found that the Government sustained its burden and showed a direct relationship between the information sought and the subject of the investigation. 561 F.2d at 111

And in *SEC v. McGoff*, 647 F.2d 185 (D.C. Cir. 1981) the Securities and Exchange Commission was investigating McGoff and two of his publishing corporations. The SEC issued subpoenas for his two corporations as part of an anti-fraud investigation. The District of Columbia Court of Appeals satisfied itself that the Government had shown a "*substantial* relation between the information sought and an important Government interest." 647 F.2d at 192 (emphasis supplied.)

Bursey v. United States, 466 F.2d 1059, 1083 (9th Cir. 1972). In addition the prosecution is obliged to show that " . . . there is a substantial possibility that the information sought will expose criminal activity within the compelling subject matter of the investigation." *Id.* This test leaves substantial discretion with district court judges to strike a balance between the competing interests of the First Amendment and the Government's right to investigate potential crimes. It brings to bear on the controversy a disinterested adjudication made without fear or favor. And in that way the public's and the prosecution's rights are adequately protected. As Judge Wilkinson, of the Fourth Circuit, said in an earlier part of this case:

> "If the grand jury is conducting a good faith investigation into possible criminal activity, the second element of the test allows it to subpoena films that are *substantially* related to the investigation. . . . . To subpoena such films, the grand jury must show a *strong possibility* that the requested films will expose criminal activity." 829 F.2d at 1305; (Emphasis supplied)

The reason for the well-conceived rule is manifest. The threat of invoking legal sanctions, implicit in a grand jury investigation, is all the more reason why the broad "all record" subpoenas in this case must be quashed. A grand jury's power of investigation does not carry with it the wholesale authority to issue these broad and sweeping subpoenas. *Gibson v. Florida Legislative Investigation Committee*, 372 U.S. 539, 558 (1963). When such wide ranging investigations are launched into the realm of free expression, we have much to fear. Any assumption that the possible failure of the grand jury investigation will amply vindicate the free circulation of adult materials is unfounded. For we know from experience that "the threat of sanctions may deter. . . . almost

as potently as the actual application of sanctions.. . . . " *NAACP v. Button*, 371 U.S. 415 at 433. Those who distribute adult materials are discouraged from doing so by the threat of such an all-encompassing and unauthorized taking of their business records and customer lists.

The Fourth Circuit's recognition that the exercise of First Amendment rights can be restrained by the indiscriminate enforcement of such grand jury subpoenas is in keeping with the spirit of this Court's decisions. For instance, this Court has recently held that the power of a grand jury can not override all constitutional protections. *Butterworth v. Smith*, 110 S.Ct. 1376, 1380 (1990) Where there is a risk that the powers of a grand jury will impinge on the exercise of First Amendment rights – even if it is oblique – there must, of constitutional necessity, be a balancing of the individual's rights against those of the prosecution. 110 S.Ct. at 1380 citing *Branzburg v. Hayes*, 408 at 690-691. In this regard, Governmental threats to prosecute the distribution of adult material, even when the threat is implicit, can act as an invalid prior restraint on the distribution of protected material. *See Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963).[12]

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[12] *Bantam Books* is a decision that examines more carefully than any other the Court's concern for the chill promoted by veiled threats of prosecution. There this Court invalidated a state commissioner's action that warned bookstores of the possibility of prosecution for the continued distribution of books found objectionable by the commission. The Court found that a request from the state commission for "voluntary" limitation of distribution of explicit material would convince most distributors to comply, as "[p]eople do not lightly disregard public officers' thinly veiled threats to institute criminal proceedings against them if they do not come around." 372 U.S. at 68. It bears repeating that Model has stopped doing all business in Virginia without there ever being any adjudication that any of their videotapes are obscene.

The Government has assembled a large collection of cases dealing with ordinary or routine grand jury investigations. However, they contribute very little to the resolution of the issues presented by this case. None of these authorities deal with the grand jury's power to investigate literature and films that are presumptively protected by the First Amendment.[13] This Court has repeatedly instructed prosecutors that investigations involving free expression implicate principles unique to the First Amendment.

The Government makes much of a number of cases where this Court held the First Amendment did not shield newspapers and bookstores from searches and grand jury investigations. And that is certainly so. But in the relevant cases the Court found that the Government had *sustained its burden* either to obtain a search warrant or to compel production of the records sought.[14] But in

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[13] *United States v. Calandra*, 414 U.S. 338 (1974) (the Fourth Amendment Exclusionary Rule inapplicable to grand jury proceedings); *Costello v. United States*, 350 U.S. 359 (1956) (hearsay admissible in grand jury proceedings); *United States v. Washington*, 431 U.S. 181 (1977) (*Miranda* warnings not required before a grand jury); *United States v. Dionisio*, 410 U.S. 1 (1973) (requiring grand jury witness to produce voice exemplars did not violate his fourth or Fifth Amendment rights).

[14] For instance, in *Branzburg* this Court held the First Amendment does not protect a reporter from having to answer a grand jury's questions concerning an on-going criminal investigation. But as pointed out earlier, there the Court found that the prosecution had fulfilled its burden of showing the need for the information sought. *See also New York v. P. J. Video, Inc.*, 475 U.S. 868 (1986) (no special exemption for a video store

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this case the prosecutor persists in saying he does not have to offer *any* reason why a bookstore in Brooklyn and a distributor in Manhattan should be forced to produce all its records before a grand jury in Virginia. That is quite different from the cases cited by the Government where sufficient showings were made in one form or another. The other cases really have no bearing on the issues presented here.[15] MFR and R. Enterprises make no claim that they are exempt from prosecution under the Federal Obscenity Law. It is the manner in which that investigation is being conducted that brings their grievance to this court.

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from the probable cause standard for a search warrant, but probable cause established); *Zurcher v. Stanford Daily*, 436 U.S. 547 (1978) (newspaper is not immune from search warrants *if probable cause is established*. However the Court suggested in *Zurcher* that an investigatory subpoena would be justified if the Government can demonstrate the material demanded is "sufficiently relevant" and satisfies the [warrant] probable cause requirement" 436 U.S. at 567); *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186 (1946) (no special exemption for newspaper publisher from subpoena issued by the Secretary of Labor, but sufficient grounds to compel production of documents established). Gov't Brf. at 29.

[15] *Citizen Publishing Co. v. United States*, 394 U.S. 131 (1969) and *Associated Press v. United States*, 326 U.S. 1 (1945) (no special exemption for the press from anti-trust laws); *Associated Press v. N.L.R.B.*, 301 U.S. 103 (1937) (no special exemption for press from labor laws); *Herbert v. Lando*, 441 U.S. 153 (1979) (no special exemption for the media from the general rules of pretrial discovery).

First Amendment Principles Apply To Corporate Records

Next, the Government argues, "The First Amendment does not ordinarily protect routine corporate business records." (Gov. brf. at 28) But, again, they are wrong. In support of this proposition they cite a case involving fraudulent commercial practices and a group of cases involving the enforcement of narrowly drawn IRS summonses for church records in cases testing a church's exempt status.[16] In some of those cases the court did recognize the "freedom of association" and the "freedom of religion" interests. But each of those cases are easily distinguishable from ours because they involved investigations of an organization's tax liability or fraudulent commercial practices – and in the one instance the use of drugs.[17]

As it happened, the organizations involved in those cases claimed that their activities came within reach of the freedom of religion clause or the free association provision. But the investigation never focused on their

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[16] *In re A Witness Before The Special October, 1981 Grand Jury (Manner)*, 722 F.2d 349 (7th Cir. 1983); *United States v. Coates*, 692 F.2d 629 (9th Cir. 1982); *United States v. Grayson County State Bank*, 656 F.2d 1070 (5th Cir. 1981); *cert. denied*, 455 U.S. 920 (1982); *United States v. Freedom Church*, 613 F.2d 316 (1st Cir. 1979).

[17] In *Employment Div., Dep't of Human Resources v. Smith*, 494 U.S. , 110 S. Ct. 1595 (1990) the Court found that the exercise of religion clause of the First Amendment did not excuse the religious practice of using hallucinogenic drugs (Peyote) and justified the denial of unemployment benefits.

religious practices.[18] In our case the investigation *is* of the video-films themselves. Such an investigation brings into play much more directly the free speech clause of the First Amendment.

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[18] For instance, in *United States v. Grayson County State Bank*, 656 F.2d 1070 (5th Cir. 1981) the court noted that the IRS summons was limited to specified types of documents. In addition the court stressed that the church failed to present any evidence that enforcement of the summons would restrict the religious activities of its members. 656 F.2d at 1074.

In *United States v. Holmes*, 614 F.2d 985, 989 (5th Cir. 1980), the Fifth Circuit found that the *Powell* test had to be applied more stringently in the case of a church asserting the First Amendment claims. *Holmes* held that the Government had to show a "necessity" for the records rather than mere "relevance" in the case of a summons directed to a church.

In re A Witness Before The Special October, 1981 Grand Jury (Manner), 722 F.2d 349 (7th Cir. 1983) involved the investigation of fraudulent sales of Laetrile. The Metabolic Research Foundation, and its president, Harry Manner, were subpoenaed to produce certain records before a grand jury. Based upon elaborate affidavits submitted by the Government, the circuit court found there was, in fact, a commercial scheme that persons being treated were "customers" not members of the Foundation and, thus, compliance with the subpoena was required. 722 F.2d at 353.

In *United States v. Freedom Church*, 613 F.2d 316 (1st Cir. 1979) the court found that the church failed to make any showing of actual or potential prejudice to their rights of associational freedoms. 613 F.2d at 320. And in *Dole v. Milonas*, 889 F.2d 885, 891 (9th Cir. 1989) the court concluded that the appellant made no showing that political or union advocacy or any other First Amendment interest is implicated here or that the Secretary seeks to put the information to any such use. 889 F.2d at 891.

And even in these "tax exempt" cases, the courts were sensitive to the asserted First Amendment claims. For instance, most of the courts applied the standards set by this court in *United States v. Powell*, 379 U.S. 48, (1964)[19] and found that Government had satisfied those prerequisites before compelling compliance with the IRS summonses. In each of those cases the Government established the *necessity* for the records! Consequently these cases do not bear any resemblance to ours.

Courts confronting this specific issue involving the taking of a company's books and records, along with magazines suspected of being obscene, have regularly applied First Amendment principles to corporate records. For instance in *G.I. Distributors, Inc. v. Murphy*, 336 F. Supp. 1036 (S.D.N.Y. 1972) and *Star Distributors, Ltd. v. Hogan*, 337 F. Supp. 1362 (S.D.N.Y. 1972), the late Judge Edward Weinfeld, one of the finest Federal District Court Judges in the county,[20] concluded that the taking of the corporate records of magazine distributors with a search warrant constituted an impermissible prior restraint. Business records that are intertwined with First Amendment materials are just as much protected as the books and video tapes themselves by the First Amendment.[21] It

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[19] We discuss in detail the standards set by this Court in *Powell* under Point II of this brief.

[20] *In Memoriam*, 693 F. Supp. at LXXXIX (S.D.N.Y. 1988)

[21] *See also Cinema Classics Ltd. v. Busch*, 339 F. Supp. 43, 48 (C. D. Ca. three judge court, Aff'd 409 U.S. 807 (1972) (seizure of still photos and business records – photos and business records ordered returned by three-judge court. Ely, Circuit Judge, and Curtis and Hill, District Judges). And in an another context, the Tenth Circuit held in *In re Grand Jury Subpoena to*

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would be a serious insult to the scholarship of this Court to suggest that all the carefully constructed procedures governing the investigation of magazines and films somehow don't apply when dealing with corporate records essential for the distribution of the films. That makes no sense at all.

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First Nat'l Bank, Englewood Colo., 701 F. 2d 115 (10th Cir. 1983) that grand jury subpoena requiring the production of an anti-tax organization's records would impermissibly chill the right of free association guaranteed under the First Amendment. In addition, First Amendment rights may be implicated by the use of a summons to obtain records of a third party in a criminal investigation. *United States v. Miller*, 425 U.S. 435, 444 N. 6 (1976)

The Second Circuit reversed on other grounds *G.I. Distributors v. Murphy*, 469 F.2d 752 (2d Cir. 1972). But by then, the books and records seized from GI Distributors had been returned by the New York County district attorney's office under Judge Weinfeld's original order and thus were no longer at issue. Nevertheless this Court granted G.I.'s petition for certiorari and vacated the Second Circuit's ruling and remanded the case. *G.I. Distributors, Inc. v. Murphy*, 413 U.S. 913, 93 S.Ct. 3056 (1973). On remand the Second Circuit adhered to its earlier decision. *G.I. Distributors, Inc. v. Murphy*, 490 F.2d 1167 (2d Cir. 1973) cert. denied 416 U.S. 939, 94 S. Ct. 1941. However, in the meantime a state court judge suppressed the magazines unlawfully seized from GI Distributors. *People v. Alvin Druss, Irving Herman and GI Distributors, Inc.* Indictment No. 492/72, Birns J., New York County, May 4, 1973.

The Subpoenas Will "Chill" Free Expression

The basic intuition underlying all of these cases is that prosecutors cannot circumvent the comprehensive protections provided by the First and Fourth Amendments by the simple expedient of a subpoena. A grand jury subpoena for all of a company's records carries an obvious threat of prosecution that simply can not go unnoticed by a distributor of sexually explicit material. For as Judge Wilkinson pointed out so incisively in the Fourth Circuit's earlier opinion:

> Faced with sufficiently broad subpoenas and sufficiently serious threats of indictment, not only distributors – but the general community of artists, sculptors, painters and photographers may be reluctant to render erotic or sensual depictions of any sort, including those that would not be found obscene. (48a)

The source of the chill in every case is the threat of prosecution, not the delivery of one copy of a film or magazine. The demand for *all* of a company's list of customers and suppliers can have just as chilling an effect upon the exercise of first amendment rights as the subpoenaing of a single copy of a book or film. Once suppliers know that a customer is under criminal investigation, they will understandably be reluctant to ship merchandise recognizing that they may be exposing themselves to a far-off criminal investigation. That is why, at the very least, before that kind of devastating chill is generated a court should be satisfied that the documents sought are substantially related to the grand jury investigation. A prosecutor simply cannot, through the promiscuous use of a subpoena,, impose a prior

restraint on the respondents' ability to distribute constitutionally protected material without making such a substantial showing.

After all, it is well settled that the form of prior restraint is of no consequence. It is the effect that counts. In determining whether or not Governmental action constitutes an unlawful prior restraint, it is the substance that must be considered, not the form. *Near v. Minnesota*, 283 U.S. 697, 708 (1931); *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 67 (1963); *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 552-554 (1975).

No one would doubt that if a prosecutor subpoenaed all the *New York Times'* books and records it would have a chilling effect upon the distribution of that newspaper. A prosecutor would have to establish that there was a compelling Government interest requiring the production of those records, and that the records were substantially related to the subject of the investigation. MFR and R. Enterprises are entitled to the same protection afforded the *New York Times* because the security of the First Amendment cannot be made to depend upon the attractiveness of the publication.

In this case MFR and R. Enterprises certainly made out a *prima facie* case of the chilling effect compliance with the subpoenas would produce. *See In re Grand Jury Subpoena to First Nat'l Bank, Englewood Colo.*, 701 F. 2d 115, 118 (10th Cir. 1983). Respondents were only obliged to establish a "*prima facie* showing of arguable First Amendment infringement" in order to trigger the "substantial" relationship test between the information sought and the compelling state interest of the grand jury's investigation.

First National Bank of Tulsa v. U.S. Depart. of Justice, 865 F. 2d 217, 219, 221 (10th Cir. 1989); *see also United States v. Citizens State Bank*, 612 F.2d 1091, 1094 (8th Cir. 1980).

This awful chill that inevitably flows in the wake of errant grand jury investigations, is confirmed in this very case by the realization that Model stopped doing all business in Virginia in 1986, when it learned it was the subject of a grand jury investigation. (673) What could be better proof of the "chilling" effect of a grand jury's powers gone awry? To allow prosecutors to subpoena the records of a distributor of films and books without any showing of relevance, would carry implications and give directions far beyond the facts of this case. One can almost hear the shouts of prosecutors throughout the country, that we don't have to ever show relevance when we want records produced before a grand jury – no matter how broad our demands. For we are the sole judges of relevance and the recipient of a subpoena has no grounds for challenging our judgment. The consequences of such a rule are terrifying.

There is one very frightening case recently reported that, perhaps more anything we say exemplifies our deep concerns over prosecutorial overreaching in the area of First Amendment freedoms. On July 23rd of this year a Federal District Judge in Washington D.C. was forced to enjoin prosecutors from harassing a distributor of magazines and video-tapes. In that case the prosecutors issued 118 subpoenas characterized by a Federal Judge as "harrassment." *PHE, Inc. v. U.S. Department of Justice*, F.Supp. , 1990 WL 1069992 (D.D.C. 1990). What better evidence is there, than that presented in this actual case

decided several months ago, where a federal prosecutor's power of subpoena has been grossly abused.[22]

The "Compelling Interest Test" Will Not Delay Grand Jury Investigations

The Government also brandishes at the Court the specter of endless mini-trials in which important grand jury investigation will be delayed interminably, if the rules of this Court governing First Amendment cases are enforced. Their fears are misplaced. Our grand jury system has somehow survived over a century of motions to quash where a wide variety of claims have been asserted ranging from overbroad subpoenas to those that are oppressive or constitute harassment. And our courts have dealt with these claims with dispatch. In this case, most of the delay was consumed in the Fourth Circuit where practically all the respondent's claims were sustained. Significantly, the Government has never sought review of the Fourth Circuit's crucial holdings quashing the subpoenas for 2,000 video-tapes demanded in the first appeal

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[22] "In the field of the First Amendment, for years our courts have been called upon to rule on overzealous actions on the part of the police and prosecutors. *Lewellen v. Raff*, 843 F.2d 1103 (8th Cir. 1988), *cert. denied* 109 S.Ct. 1171 (1989); *Fitzgerald v. Peek*, 636 F.2d 943 (5th Cir.), *cert. denied* 452 U.S. 916 (1981); *Wilson v. Thompson*, 593 F.2d 1375 (5th Cir. 1979); *Krahm v. Graham*, 461 F.2d 703 (9th Cir. 1972); *The Video Store, Inc. v. Holcomb*, 729 F.Supp. 579 (S.D. Ohio 1990); *ACLU v. City of Pittsburgh*, 586 F.Supp. 417 (W.D. Pa. 1984); *Penthouse International, Ltd. v. McAuliffe*, 436 F.Supp. 1241 (N.D. Ga. 1977), *aff'd*, 610 F.2d 1354 (5th Cir. 1980); *Drive-In Theaters, Inc. v. Huskey*, 305 F.Supp. 1232 (W.D.N.C. 1969), *aff'd*, 435 F.2d 228 (4th Cir. 1970).

and the 193 video-tapes in the second. Apparently these proceedings would have been delayed in any event due to the prosecutor's most unfortunate misunderstanding of the constitutional law as it bears on those issues.

And finally, a word should be said about the Fourth Circuit's decision being cast in terms of Rule 17(c). Obviously, the First Amendment phase of the case simply cannot be divorced from the Fourth Circuit's holding. Those issues were fully briefed and argued in the Fourth Circuit and were urged in opposition to the Government's petition for certiorari. Although the court of appeals did not specifically address the First Amendment, as it relates to the business records, respondents may urge any ground to support the court's judgment whether or not it was relied upon or considered below. *See, e.g., United States v. Arthur Young & Co.*, 465 U.S. 805, 814, n.12 (1984). And this Court, of course, can rely upon First Amendment principles to support its judgment of affirmance for it is empowered to look beyond the language used by the lower court and decide ". . . . precisely the ground on which the judgment rests." *Black v. Cutter Laboratories*, 351 U.S. 292, 298 (1956). Clearly, the foundation for the Fourth Circuit's decision is that the Government failed to show, in any way, the relevancy of the documents sought by the subpoena. (8a, 9a).

Thus, the Court should affirm the decision of the Fourth Circuit on grounds that the demand in this case involved records intimately connected with distribution of books and films protected by the First Amendment. The Court should adhere to the rule that requires a prosecutor who seeks all the business records of a distributor of magazines and videotapes, protected by the First

Amendment, to show that they are substantially related to a compelling state interest before their production can be demanded before a grand jury.

II

SINCE THE GOVERNMENT FAILED TO MAKE ANY SHOWING OF HOW THE SUBPOENAED RECORDS WERE RELEVANT TO THE GRAND JURY INVESTIGATION, THE SUBPOENAS WERE PROPERLY QUASHED UNDER BOTH THE FOURTH AMENDMENT AND RULE 17(c)

Even if this were not a First Amendment case, the Fourth Amendment would require the quashing of the subpoenas. The rule announced by the Fourth Circuit is consistent with a principle traditionally applied to resolve conflicts between a citizen's right of privacy and the Government's need to investigate crime. That rule, simply stated is: when a citizen complains that a prosecutor's grand jury subpoena unduly intrudes upon his private papers, protected by the Fourth Amendment and Rule 17(c), the Government must make some showing of how the information sought is relevant to the grand jury investigation. This well-respected rule reflects a sound national policy of protecting the integrity of the public's right to privacy and at the same time accommodating the Government's interests in prosecuting crime. This rule is deeply rooted in our constitutional tradition.

The right of privacy secured by the Fourth Amendment extends to Government process served upon a corporation which is the subject of a Government investigation. *Hale v. Henkel*, 201 U.S. 43, 76, 77 (1906). *See*

also Federal Trade Commission v. American Tobacco Co., 264 U.S. 298 (1924). Subpoenas for the production of business records are subject to Fourth Amendment scrutiny which includes judicial review to determine whether "the inquiry is one the demanding agency is authorized by law to make and the materials specified are *relevant*." *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186, 208 (1946) (Emphasis supplied).

A Governmental investigation into corporate matters may be so "*unrelated* to the matter properly under inquiry as to exceed the investigatory power." *United States v. Morton Salt Co.*, 338 U.S. 632 at 652, 70 S.Ct. 357 at 369 (1950) *citing Federal Trade Commission v. American Tobacco Co.*, 264 U.S. 298 (1924). And finally, the Court has emphasized that prosecutors will not be permitted to promiscuously embark upon "fishing expeditions." *FTC v. American Tobacco Co.*, 264 U.S. 298, 305-06 (1924). For instance, in the *American Tobacco* case this Court stressed, in language that was spare but telling:

> "It is contrary to the first principles of justice to allow a search through all [a corporation's] records, relevant or irrelevant, in the hope something will turn up." 298 U.S. at 306.

The *Morton Salt* case recognized the "relevancy" requirement imposed upon an investigating authority which requires that the "information sought [b]e reasonably relevant" to the inquiry. 338 U.S. at 642-43, 652. And in *Oklahoma Press*, the Court indicated, that the enforcement of an administrative subpoena is "essentially the same as the grand jury's, or the court's in issuing other pre-trial orders for the discovery of evidence, and *is governed by the same limitations*." 327 U.S. at 216.

(Emphasis supplied). In addition, other courts have correctly construed the crucial language in both *Morton Salt* and *Oklahoma Press* as fully applicable to grand jury subpoenas. *Grand Jury Proceedings (Schofield I)*, 486 F.2d 85, 90 (3rd Cir. 1973);[23] *In re Grand Jury Proceedings: Subpoena Duces Tecum Larry Danbom and Western Union v. United States*, 827 F.2d 301, 303 (8th Cir. 1987); *United States v. Boggs*, 493 F.Supp. 1050, 1052 (D.Mont. 1980).

". . . . in the hope something will turn up."

What was condemned in the *American Tobacco Co.* case is precisely what occurred here. MFR and R. Enterprises demonstrated that their records had absolutely no connection to Virginia. Once that showing was made, the Fourth Circuit rightly concluded that the prosecutor bore some burden of establishing a connection between their records and the Virginia investigation. Otherwise, the grand jury would be permitted to search through all of MFR and R. Enterprises' documents in the mere "hope that something will turn up."

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[23] As the Third Circuit perceptively pointed out in the *Schofield I* case, "Although grand jury subpoenas are occasionally discussed as if they were the instrumentalities of the grand jury, they are in fact almost universally instrumentalities of the United States Attorney's office or some other investigative or prosecutorial department of the Executive branch. Grand jury subpoenas then, when they are brought before the federal courts for enforcement, for all practical purposes are exactly analogous to subpoenas issued by a federal administrative agency on the authority of a statute, without any prior judicial control." 486 F.2d at 90.

This would have constituted the kind of outrageous "fishing expedition" so soundly condemned in the *American Tobacco* case. (8a-10a) When the Government failed to meet that burden, the subpoenas were correctly quashed because the prosecutor flatly refused to offer any explanation concerning how the records of a small bookstore in Brooklyn in any way related to a grand jury investigation in Virginia. Without any reasonable requirements of relevancy, every subpoena risks becoming a "fishing expedition." The element of relevancy is the sovereign ingredient that limits a subpoena to its legitimate purpose.

In *United States v. Powell*, 379 U.S. 48 (1964), this Court held that for an IRS summons to qualify for judicial enforcement it must be shown:

> That the investigation will be conducted pursuant to a *legitimate purpose*, that the inquiry may be *relevant* to the purpose, that the information is not already in the commissioner's possession and that the administrative steps required by the [Internal Revenue] Code have been followed. . . . 379 U.S. at 57, 58 (emphasis supplied)

The reasoning and logic of *Powell* is fully applicable to a grand jury subpoena. And the Fourth Circuit in *United States v. Richards*, 631 F.2d 341, 345 (4th Cir. 1980) equated an IRS summons to that of a grand jury subpoena. In *Richards* the court defined relevancy to mean, "a realistic expectation" that something may be discovered under the compulsory process employed by the Government. 631 F.2d at 345. It further concluded that an IRS summons will not be enforced if it amounts to no more than a "fishing expedition." 631 F.2d at 344, 345, *citing United States v. Powell*, 379 U.S. 48 at 57 (1964).

The Alignment of the Circuits on the Need For A Prosecutor to Show Relevance

Although employing different standards, most circuit courts in the country have adopted the rule requiring some showing of relevance when a subpoena is challenged. *In re Grand Jury Proceedings (Schofield I)*, 486 F.2d 85 (3rd Cir. 1973); *In re Grand Jury Proceedings (Schofield II)*, 507 F.2d 963 (3rd Cir. 1975); *In re Grand Jury Matter (Gronowicz)*, 764 F.2d 983, 986 (3d Cir. 1985) (*in banc*) *cert. denied*, 474 U.S. 1055 (1986). *In re Grand Jury Subpoena Duces Tecum Issued on June 9, 1982)*, 697 F.2d 277, 281 (10th Cir. 1983).[24]

The Second Circuit requires the Government to make a showing of relevance once an aggrieved party establishes "that the information sought bears no conceivable relevance to any legitimate object of investigation by the federal grand jury." *In re Liberatore*, 574 F.2d 78 (2d Cir.

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[24] We pause here for a moment to point out that although the *Schofield* rule, requiring a preliminary showing of relevance, is sound and certainly comes well within the reach of the circuit court's authority, the Fourth Circuit has not insisted upon such a preliminary showing. The court of appeal's rule is simply that when a grand jury subpoena is challenged, then and only then, must the prosecutor make some showing that the materials sought are relevant to their investigation. The Government – we presume inadvertently – uses the term "preliminary showing" interchangeably with the traditional showing required by most courts when a subpoena is contested on relevance grounds.

1978).[25] The Sixth Circuit follows the rule employed by the Second Circuit and requires a showing of relevance when the "no conceivable relevance" test is fulfilled. *In re Grand Jury Subpoena, 84-1-24 #1 To Robert Battle, III*, 748 F.2d 327 (6th Cir. 1984). The Eighth Circuit holds that a district court has the power under Rule 17(c) to limit material demanded by a subpoena to that which is "relevant" to the grand jury investigation. *In re Grand Jury Proceedings: Subpoena Duces Tecum Larry Danbom and Western Union v. United States*, 827 F.2d 301, 305 (8th Cir. 1987). The other circuits have either not addressed the specific issue or have rejected the much maligned *Schofield* rule that requires a "preliminary" showing of relevance. *In re Grand Jury Proceedings Tom Hergenroeder*, 555 F.2d 686 (9th Cir. 1977); *In re Grand Jury Proceedings v. Bank of Nova Scotia*, 691 F.2d 1384 (11th Cir. 1982).

Of course, "relevance," in the context of a grand jury investigation, is not probative relevancy, but rather it is measured by a less exacting standard. The relevancy requirement is satisfied as long as there is a logical connection between the subpoenaed documents and the charges that constitute the focus of the grand jury's

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[25] However, the Second Circuit cautioned:

> "This is not to say, of course, that the grand jury is endowed with an absolute license to seek evidence not *relevant* to its investigative function but we are only saying that the Government does not in each and every case bear the constant burden of initially showing the relevance of the particular evidence sought to be produced by way of subpoena." 574 F.2d at 83. (Emphasis supplied)

investigation.[26] *In re Special Grand Jury Impanelled January 21, 1975*, 529 F.2d 543, 549 (3d Cir. 1976); *United States v. Reno*, 522 F.2d 572, 576 (10th Cir. 1975); *In re Grand Jury Subpoena (Soto-Davila)*, 96 F.R.D. 406 (D.P.R. 1982).

In the face of these formidable authorities, ranging from this Court down through most of the circuit courts, it cannot be doubted that when a challenge is made to a subpoena, the prosecutor must make some "reasonable" showing of relevance. The flexibility of "reasonable relevance" gives a district court judge sufficient discretion to delineate those cases where the power of subpoena is being abused and require compliance when it is not. We assume that in most situations the Government will be able to show a reasonable degree of relevance – as they have done in virtually all the cases cited in both the Government's and the Respondent's briefs. Since the Government in this case elected to stand its ground and

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[26] Down through the years the *Schofield* rule has lost much of its luster. In decisions since the first *'Schofield'* case, the Third Circuit has made it clear that the *'Schofield* affidavit' requires only a minimum disclosure of the grand jury's purpose. Moreover, the Court regularly defers to the district court's judgments about the sufficiency of the particular *'Schofield* affidavit' in the circumstances of each case. Thus, a prosecutor in the Third Circuit is only required to make a showing that the documents sought are reasonably related to the "subject" of the grand jury's investigation. *See, In re Grand Jury Proceedings, Harrisburg Grand Jury*, 658 F.2d 211 (3d Cir. 1981); *Appeal of Hughes*, 633 F.2d 282, 286-88 (3d Cir. 1980); *In re Grand Jury Applicants, C. Schmitt & Sons, Inc.*, 619 F.2d 1022, 1028 (3d Cir. 1980); *In re Grand Jury Proceedings, Smith*, 579 F.2d 836, 838-39 (3d Cir. 1978): *In re Grand Jury Proceeding, Schofield II*, 507 F.2d 963, 975 (3d Cir. 1975). Even with the *Schofield* rule grand jury investigations in the Third Circuit have not come to a halt.

make absolutely no showing of relevance, the Fourth Circuit's decision should be sustained.

The requirement that a prosecutor justify a need for information sought in a criminal proceeding when constitutional or other legal objections are interposed is not novel. Over the years the Government has regularly been required to demonstrate some cause when its demands for evidence have conflicted with the constitutional rights asserted by individuals. For instance, in *Kastigar v. United States*, 406 U.S. 441, 460 (1972) when a defendant demonstrates that he has testified under a grant of immunity, the federal authorities have a heavy burden of proving that their evidence is derived from an independent, untainted source.

In *Gelbard v. United States*, 408 U.S. 41, 46-51 (1972) when a grand jury witness asserts a "colorable" claim that the questions to be asked before the grand jury are derived from electronic surveillance, the prosecutor must demonstrate that those questions are *not* obtained from unlawful eavesdropping. And only last year in *United States v. Zolin*, 491 U.S. , 109 S.Ct. 2619 (1989), this Court held that before a witness in a tax fraud investigation can be subjected to an *in camera* investigation of his attorney-client privilege claim, the Government must present sufficient evidence to support a reasonable belief that the inquiry will disclose a basis for the crime-fraud exception.

These are just a few examples of how courts have always been called upon to resolve the complaints of

citizens that prosecutors have overstepped their bounds. And in each and every case, our courts have traditionally required that a prosecutor establish, by some measure of proof, a basis for overriding the constitutional or legal rights asserted. To suggest that a prosecutor be able to decide for himself unilaterally his right to receive the information he seeks, paramount to the rights of the people, is unthinkable and is alien to our most basic constitutional disciplines.

The rules fashioned in these other cases are fully applicable to our grand jury situation. The right of privacy guaranteed by the Fourth Amendment is every bit as substantial as the attorney-client privilege; the privilege against self-incrimination or the right to know whether questions asked before a grand jury were derived from electronic surveillance.

The rule we urge strikes a reasonable balance between the Government's right to investigate suspected crimes and the rights of citizens to remain reasonably free from any unauthorized prying into the privacy of their affairs. Without these protections, then everyone would be at the mercy of prosecutors throughout the country who may, without restraint, abuse the grand jury process. Which would be better – to have no controls over a prosecutor's use of the subpoena power, or to adhere to the rule that requires some showing of relevance in a proper situation? This case, and the frightening *PHE* case cited earlier, illustrate why some constitutional controls must continue to be exerted in this area of the law.

Once again we must come back to the question of prejudice. How is a prosecutor disadvantaged by a modest showing of relevance in a Fourth Amendment case and a more substantial showing when the First Amendment is implicated? For over half a century prosecutors and lawyers for administrative agencies have been able to successfully advance their investigations working within the frame work of this rule. Then why can't the United States Attorney from the Eastern District of Virginia?[27]

The Solicitor General Agrees That In A Proper Case The Government Would Have to Show Relevance.

Today, in this Court, the Solicitor General, agrees that once a person shows that business records subpoenaed have "no conceivable relevance" to the grand jury's investigation, the prosecution is obligated to make some showing of relevance. *See In re Liberatore*, 574 F.2d 78 (2d Cir. 1978). But then, he quickly adds that the "no conceivable relevancy" test be limited to those instances of "genuine grand jury abuse."[28] However, such a harsh standard would, for all practical purposes, eliminate completely the relevance requirement and is constitutionally unacceptable.

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[27] But then this is the prosecutor who felt he was well within his rights in subpoenaing over 2,000 video-tapes to a grand jury in Virginia without any showing of relevance or that they were obscene. Perhaps that is the answer.

[28] Over the years the nomenclature of "abuse of grand jury process"; "reasonablenss"; "oppressiveness"; and "relevance"

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A much more workable rule, in a case involving a straight Fourth Amendment claim or an objection under Rule 17(c), would be for an aggrieved party to make a "reasonable" showing that the records sought are not relevant to the grand jury investigation. The standard of reasonableness has worked eminently well in virtually every other sector of the law. And under that criterion a district judge has sufficient discretion to weed out frivolous claims and attend to the meritorious ones. And it bears repeating, the implementation of the relevancy rule will not result in a host of "mini-trials" that will bring to a standstill grand jury investigations across the country. It hasn't in the past and it won't in the future. Most of these claims will be decided on papers. In those cases where meritorious claims are raised, in all likelihood, the district court will be satisfied with the Government's showing of relevance and in the exceptional case the prosecutor will narrow the subpoena. The reasonable relevance rule will not impair grand jury investigations.

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have, on occasion, been used interchangeably. Obviously, a subpoena that demands 500,000 documents from a company may constitute an abuse of the grand jury process; it can also be oppressive and unreasonable; and the documents are irrelevant to the grand jury's investigation. The complaint registered by the respondents raised all of these claims – "irrelevance," "abuse of grand jury process" and the "chilling" of First Amendment rights.

"And then who will guard the guards?"

Unhappily, during the last decade we have seen a rash of cases involving an abuse of the grand jury process both in federal and state courts.[29] Articles are coming forth in salvos discussing, in elaborate detail, abuses of the grand jury process – because recently an abundance of fresh information has been produced on this sad subject. Stored in the margin of this brief are some of the articles that are illustrative of a growing national concern.[30] Their assembly has dispelled the myth that a

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[29] *United States v. Hogan*, 712 F.2d 757 (2d Cir. 1983), (inflammatory hearsay which depicted the defendants as "bad persons"); *United States v. Estepa*, 471 F.2d 1132 (2d Cir. 1972), (prosecutor presented misleading hearsay evidence to grand jury); *United States v. Serubo*, 604 F.2d 807 (3d Cir. 1979), (prosecutor's abuse of witnesses and prejudicial comments before a grand jury); *United States v. Samango*, 607 F.2d 877 (9th Cir. 1979) (prosecutor committed a series of "indiscretions" before a grand jury); *United States v. Basurto*, 497 F.2d 781 (9th Cir. 1974), (prosecutor presented perjured testimony before a grand jury).

[30] The articles that have expressed concern over grand jury abuse are: Althoff and Greig, *Concerns Raised by Recent Grand Jury Investigations*, 20 Crim. L. Bull. 217-32; Shannon, *The Grand Jury: True Tribunal of the People or Administrative Agency of the Prosecutor?* 2 N.M. L. Rev. 141 (1972); *Hearings on S. 3274 Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 94th Cong. 2d Sess. 39-40 (1976); Mueller, *Grand Jury Abuse: The Remedy after Mechanik and Kilpatrick*, 17 Colorado Lawyer 647(3) (1988); Wallach, *Prosecutorial Misconduct in the Grand Jury: Dismissal of Indictments Pursuant to the Federal Supervisory Power*, 56 Fordham Law Review 129-150 (1987); Davis, Witley, *The Federal Grand Jury: Friend or Foe?*, 65

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grand jury is an independent body. In fact, it has become a "tool" of the prosecution and is used at their pleasure. None other than the late Mr. Justice Douglas, in a dissent, quoting Judge Campbell, who served over 32 years as a federal judge, stressed:

> "This great institution of the past has long since ceased to be a guardian of the people for which purpose it was created at Runnymede. Today it is but a convenient tool for the prosecutor – too often used solely for publicity. Any experienced prosecutor will admit that he can indict anybody at any time for almost anything before any grand jury." *United States v. Dionisio*, 410 U.S. 1, 23 (1973)

This court has displayed its sensitivity to these concerns when it said, at a minimum "the grand jury is not meant to be the private tool of the prosecutor." *United States v. Fischer*, 455 F.2d 1101, 1105 (2d Cir. 1972). Neither may a "United States attorney . . . issue a grand jury subpoena for the purpose of conducting his own inquisition," nor may "the Government conduct a general

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Mich B.J. 58-63 (1986); *The Grand Jury Subpoena: Is It the Prosecutor's "Ultimate Weapon" Against Defense Attorneys and Their clients?*, 13 *Pepperdine L. Rev.* 791-821 (1986); Note, *The Exercise of Supervisory Power to Dismiss a Grand Jury Indictment – A Basis For Curbing Prosecutorial Misconduct*. 45 Ohio St. L.J. 1077-1101 (1984). The cases catalogued here reflect an alarming rise in the abuse of the grand jury process in one form or another. And in most of the cases courts were forced to reverse convictions or dismiss indictments because of the magnitude of the prosecutorial misconduct in connection with the grand jury.

fishing expedition under grand jury sponsorship." *In re September 1971 Grand Jury (Mara)*, 454 F.2d 580 (7th Cir. 1971), *rev'd, sub nom United States v. Mara*, 410 U.S. 19 (1973).[31] And yet this case perhaps better than any other demonstrates how the subpoena powers of the grand jury can be misused. The more common and widespread the misuse of grand jury subpoenas, the greater the need to deter prosecutorial overzealousness of this kind. The use of judicial intervention, and the adherence to a rule requiring some showing of relevance when a subpoena is challenged, enhances the protection of individual rights, deters future prosecutorial misconduct and preserves the integrity of the grand jury process. Federal courts, of course, have an institutional interest, independent of their concern for the rights of particular litigants, in preserving the appearance of fair practice of prosecutors before grand juries.

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[31] In fact a grand jury does operates as a law enforcement agency, with very little control. Grand jury subpoenas are issued by the United States Attorney's office. *See United States v. Martino*, 825 F. 2d 754 (3rd Cir. 1987); *Doe v. DiGenova*, 779 F. 2d 74, 80 (D.C. Cir. 1985). *United States v. Cleary*, 265 F. 2d 459, 461 (2d Cir. 1959) Under Rule 17(c) subpoena forms are issued in blank by the clerk of the court for a prosecutor to do with as he pleases.

Rule 17(c) Authorized The Quashing Of A Subpoena Which Demands Documents That Are Irrelevant To Grand Jury's Investigation.

Rule 17(c) authorized the Fourth Circuit's quashing of the subpoena in this case on grounds beyond those provided by the Fourth Amendment when enforcement of the subpoena would be unreasonable or oppressive. *See In re Grand Jury Subpoena Served February 27, 1984*, 599 F.Supp. 1006, 1018 (E.D. Wash. 1984); *Application of Radio Corp. of America*, 13 F.R.D. 167, 171 (S.D.N.Y. 1952); 8 J. Moore, *Moore's Federal Practice*, § 17.11 at 17-35 (1987). Thus courts are authorized in limiting subpoenas to matters having a greater degree of general relevancy to the subject matter of the investigation. In other words, the unreasonableness provision of Rule 17(c) provides a basis for quashing a subpoena that demands many, many documents that are irrelevant to the investigation – on the grounds that the subpoena is unreasonable.

Asserting that "even if respondents transacted no business in Virginia, that would not render the subpoenaed records irrelevant to the grand jury investigation," the Government hypothesizes:

> At a minimum, the records might demonstrate a pattern of obscenity violations, including violations in other States, and thus constitute evidence of knowledge and intent on the part of Martin Rothstein (respondents' owner). . . . Alternately, the out-of-state acts might constitute overt acts in a conspiracy, properly chargeable in Virginia, involving Rothstein or Model Magazine. Or, the out-of-state acts might prove that respondents or their principles aided and abetted obscenity violations committed in Virginia by either Rothstein or Model Magazine.

(Gov. Brf. 31-32; footnotes omitted.) These theories of relevance were not presented to the district court at the time respondents challenged the subpoena on relevancy grounds, nor is it known whether any of these theories was the actual basis for issuance of the subpoena. They are after-the-fact conjecture, offered for the first time in this Court. Even if one of these theories were the actual basis for issuance of the subpoena, respondents never had an opportunity in the district court to challenge its validity and the district court never determined its worth.

These theories, therefore, cannot sustain the subpoena at this stage of the proceedings. In *United States v. Rios*, 110 S.Ct. 1845 (1990), the Government contended in this Court that its delay in sealing electronic surveillance tapes was the result of a misunderstanding of the applicable statutory terms by the attorney supervising the surveillance, who believed he was not required to seek sealing of the tapes until a hiatus in the investigation. Even though the Court viewed this explanation as acceptable in the abstract, the Court pointed out that a satisfactory explanation cannot merely be one presented at the appellate level, but should be based on evidence presented and submissions made in the district court. *Id.* at 1851.

Noting that it was not clear if the supervising attorney's misunderstanding was the explanation advanced by the Government in the district court, the Court therefore remanded the case for a determination whether the explanation to the district court corresponded to that pressed in this Court. *Id.* Justice O'Connor, joined by Justice Blackmun, concurred, stressing that the Government's explanation "should be based on the findings

made and the evidence presented in the district court, rather than on a *post hoc* explanation given for the first time on appeal." *Id.* at 1852. Here, *none* of the Solicitor General's theories of relevancy were ever presented to the district court, not even *ex parte*. The court of appeals was therefore correct in quashing the subpoena. Speculative theories of relevancy offered for the first time in this Court cannot revive that subpoena.[32]

And finally the Government tries to impeach the Fourth Circuit's decision by arguing that it holds a grand jury subpoena can only be enforced if a prosecutor makes a showing that the documents sought would be admissible at trial. We believe this is a mischaracterization of the Circuit Court's opinion. For example, the district court's refusal to quash the subpoena requesting certain of Model's corporate records was sustained by the Fourth Circuit without any showing of their admissibility at a trial. In fact, a large portion of the records sought in all likelihood would not be admissible at a trial in Virginia. Clearly, the terms "relevance" and "admissibility" are collapsed in the Court's holding so that conceptually they mean the same. Respondents in the courts below argued strenuously the strict venue provisions for the prosecution of films claimed to be obscene. In that respect, the Court, as an added thought, observed that the documents from a bookstore in Brooklyn would "most likely" be

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[32] While the judgment of the court of appeals should therefore be affirmed, the Government remains free to issue a new subpoena for whatever materials it sees fit. Upon a motion to quash that subpoena in the district court on relevancy grounds, the Government would have an opportunity to assert in that court the relevance of the materials sought.

inadmissible at a trial. (10a). However, perhaps more importantly, this case cannot be judged in a vacuum or detached from its terrible history. It came to the Fourth Circuit bearing a stigma of prosecutorial overreaching that is still with it.

What this case comes down to is this: certainly a majority of the courts of this country have concluded that a prosecutor must make some showing of relevance when a good-faith challenge is made to a grand jury subpoena. The Fourth Circuit's holding is consistent with that principle and therefore it should be sustained. Because in a system where the rights of the individual must be constantly balanced against those of the Government, a citizen must always have the opportunity of challenging the power of the Government when it is claimed to be abusive. If we are to keep faith with these ancient principles, we simply cannot tolerate any rule that will allow a prosecutor unfettered discretion in demanding all of a company's private papers before a grand jury in a far-off state. For if we were to do so then we may well be on our way to letting prosecutors decide for themselves – out of official curiosity – what records they will require to be produced before a grand jury. And we will have to ask ourselves the question put by Juvenal over 1500 years ago, "And then who will guard the guards?"

CONCLUSION

The Writ of Certiorari should be dismissed as improvidently granted. In the alternative, the judgment of the Court of Appeals for the Fourth Circuit should be affirmed.

Respectfully submitted,

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CONSTITUTIONAL PROVISIONS

Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of people peaceably to assemble, and to petition the Government for a redress of grievances.

Amendment IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

RULE INVOLVED

Rule 17 of the Federal Rules of Criminal Procedure provides, in pertinent part, as follows:

> (c) Production of documentary evidence and of objects.
>
> A subpoena may also command the person to whom it is directed to produce the books, papers, documents or other objects designated therein. The court on motion made promptly may quash or modify the subpoena if compliance would be unreasonable or oppressive. The court may direct that books, papers, documents or objects designated in the subpoena be produced before the court at a time prior to the trial or prior to the time when they are to be offered

in evidence and may upon their production permit the books, papers, documents or objects or portions thereof to be inspected by the parties and their attorneys.

FOR ARGUMENT

No. 89-1436

In the Supreme Court of the United States

OCTOBER TERM, 1990

UNITED STATES OF AMERICA, PETITIONER

v.

R. ENTERPRISES, INC., and
MFR COURT STREET BOOKS, INC.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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REPLY BRIEF FOR THE UNITED STATES

This case concerns the appropriate legal standard for quashing a grand jury subpoena for corporate records. Construing Rule 17(c) of the Federal Rules of Criminal Procedure, the court of appeals held that before the government may enforce compliance with such a subpoena, it must establish that the requested materials would be "relevan[t]" and "admissible as evidence at trial." Pet. App. 10a. The court emphasized that unless grand jury subpoenas are held to such a strict threshold standard, they might be used as "a means of discovery in addition to that pro-

vided by Fed. R. Crim. Pro. 16." *Id.* at 9a. Applying that standard, the court quashed the subpoenas for respondents' corporate records. It concluded that the subpoenaed materials "would most likely be inadmissible on relevancy grounds at any trial that might occur," and that the records would therefore "fail to meet the requirement[] that any documents subpoenaed under Rule 17(c) must be admissible as evidence at trial." *Id.* at 10a.

1. We restate the court of appeals' decision because respondents evidently have no desire to defend it on its own terms. Instead, respondents and amicus curiae PHE, Inc., recast the court's decision in terms they find more acceptable, and then defend that new decision on grounds the court of appeals never addressed.

For example, both respondents and PHE expressly disavow the court of appeals' insistence that materials subpoenaed by the grand jury first be found relevant and admissible at trial. "Of course," respondents declare (Br. 37), " 'relevance,' in the context of a grand jury investigation, is not probative relevancy, but rather it is measured by a less exacting standard." PHE makes the same point, conceding (Amicus Br. 16 n.14) that it "does not advocate the adoption of a strict rule of admissibility regarding material subpoenaed by a federal grand jury." As we explained in our opening brief (at 9-11), those concessions are amply justified: the court of appeals' decision—holding the grand jury to the same standards of relevance and admissibility that apply at trial —cannot be squared with this Court's consistent recognition that the operation of the grand jury "generally is unrestrained by the technical procedural and evidentiary rules governing the conduct of criminal

trials." *United States* v. *Calandra*, 414 U.S. 338, 343 (1974).

Rather than defend the court's ruling, respondents and PHE simply wish the opinion away. In respondents' view, the discussion about admissibility at trial was merely "an added thought" (Br. 48), while in PHE's words, "this statement—whatever its meaning—is merely dictum" (Amicus Br. 15). But the court of appeals did not have so modest a view of its own decision. Extrapolating (Pet. App. 6a) from a portion of *United States* v. *Nixon*, 418 U.S. 683, 699 (1974), which required that documents subpoenaed *for trial* be found "evidentiary and relevant (footnote omitted)," the court of appeals stated, quite plainly, that any documents subpoenaed by the grand jury under Rule 17(c) must likewise "be admissible as evidence at trial." Pet. App. 10a.[1] The court then applied that rule in deciding to quash the subpoenas in this case, finding that the subpoenaed materials "would most likely be inadmissible on relevancy grounds at any trial that might occur." *Ibid.* Respondents and their amicus appear to agree with us that the court's ruling, at least to that extent, cannot be sustained.

2. In place of the court of appeals' standard, we urged in our opening brief (at 13-21) that the Court adopt the rule that has been adopted by a majority of the courts of appeals. Under that rule, the recipient must carry the burden of showing that the subpoenaed materials bear "no conceivable relevance to any legitimate object of investigation by the federal

[1] The court of appeals recognized that the *Nixon* Court was reviewing a trial subpoena, not a grand jury subpoena, but it found the "interpretation of Rule 17(c)" articulated in the *Nixon* case "equally applicable in this case." Pet. App. 7a n.2.

grand jury." *In re Liberatore*, 574 F.2d 78, 83 (2d Cir. 1978). We explained that imposing that burden on the recipient (1) is consistent with the usual rules for assigning burdens of proof, (2) gives force to the presumption of grand jury regularity, and (3) diminishes the occasions on which grand jury proceedings will be interrupted by "minitrials and preliminary showings." *United States* v. *Dionisio*, 410 U.S. 1, 17 (1973). We also observed that the "no conceivable relevance" standard of proof accords with this Court's recognition that the scope of a grand jury's inquiry should not be "limited narrowly by questions of propriety or forecasts of the probable result of the investigation, or by doubts whether any particular individual will be found properly subject to an accusation of crime." *Blair* v. *United States*, 250 U.S. 273, 282 (1919).

Respondents and PHE agree that the subpoena recipient should be required to bear at least a threshold burden to challenge the relevance of the subpoenaed material.[2] But they urge this Court to adopt a less

[2] Surprisingly, both respondents (Br. 10, 36 n.24) and PHE (Br. 9) contend that the court of appeals actually imposed such a threshold burden on the subpoena recipients. As respondents read the opinion, the court of appeals "was careful to point out that the obligation of the Government to demonstrate relevance only becomes operative *after* the recipient of the subpoena shows that the records sought are not relevant to the grand jury's investigation." Resp. Br. 10. PHE is more candid, acknowledging that the court of appeals "did not explain when the government's obligation to demonstrate some relevance is triggered." PHE Br. 9. PHE nevertheless insists that the court's "actual holding demonstrates that this obligation arises only *after* the recipient of the subpoena makes a substantial showing that the material sought is not relevant to a legitimate grand jury investigation." *Ibid.*

As PHE properly concedes, the court of appeals did not expressly require respondents to make a threshold showing of

exacting standard of proof. In respondents' view, the recipient should be required simply to "make a 'reasonable' showing that the records sought are not relevant to the grand jury investigation." Resp. Br. 42. PHE offers a somewhat more rigorous approach, under which the recipient would have to make a showing (possibly "a substantial showing" (Amicus Br. 9)) that "it is unlikely that the materials sought are relevant to the investigation" (Amicus Br. 13). At that point, it is said, the burden should shift to the government to make either a " 'reasonable' showing" (Resp. Br. 38) or at least a "minimal showing" (PHE Amicus Br. 12) of relevance to the investigation.

These proposals are blueprints for grand jury delay. Under respondents' proposed standard, a subpoena recipient need make only a "reasonable" showing of irrelevance. Such an open-ended rule would invite motions to quash grand jury subpoenas, since it takes little imagination to assert a facially "reasonable" objection on relevance grounds. The trial court would then be required to assess the "reasonableness" of the recipient's objection, presumably by examining the subpoenaed material and evaluating the connection between that material and the underlying investigation. Rule 17(c) hearings would swiftly be converted into lengthy, factual inquiries, focusing on the nature of secret grand jury proceed-

irrelevance—let alone "a substantial showing" of irrelevance (PHE Br. 9). To the contrary, as we read its opinion, the court of appeals imposed the threshold burden squarely on the government: "The government must offer some evidence of a connection between MFR and R. Enterprises and Virginia *before it can subpoena* the companies' business records under 17(c)." Pet. App. 9a (emphasis added).

ings, and the reasonableness of a request for evidence.[3]

By contrast, the "no conceivable relevance" standard, which is well grounded in circuit court precedent (see Pet. Br. 14-16), is designed to limit Rule 17(c) motions to instances of genuine grand jury abuse. Unless a subpoena recipient can show that there is

[3] Respondents' proposed "reasonableness" test recalls certain of this Court's early decisions forbidding administrative agencies from engaging in "fishing expeditions" when issuing subpoenas for records. Those decisions, however, are no longer good law, even in the administrative subpoena context. As Justice Jackson explained for a unanimous Court in *United States* v. *Morton Salt Co.*, 338 U.S. 632 (1950), "early in the history of the federal administrative tribunal, the courts were persuaded to engraft judicial limitations upon the administrative process. * * * Administrative investigations fell before the colorful and nostalgic slogan 'no fishing expeditions.'" 338 U.S. at 642. "More recent views," he noted, "have been more tolerant of [the administrative process] than those which underlay many older decisions." *Ibid.* Applying that "more tolerant" approach, and expressly analogizing the administrative process to the grand jury (*ibid.*), Justice Jackson stated: "Even if one were to regard the request for information in this case as caused by nothing more than official curiosity, nevertheless law-enforcing agencies have a legitimate right to satisfy themselves that corporate behavior is consistent with the law and the public interest." *Id.* at 652.

Respondents also claim that their "reasonableness" test will "deter prosecutorial overzealousness" and "preserve[] the integrity of the grand jury process." Resp. Br. 45. But in cases of genuine grand jury abuse, there are several available remedies other than interrupting the grand jury process—including contempt, disciplinary proceedings, and criticism in published opinions. *Bank of Nova Scotia* v. *United States*, 487 U.S. 250, 263 (1988). Each of those remedies "allow[s] the court to focus on the culpable individual" (*ibid.*), without requiring the investigative process to grind to a halt.

no conceivable basis for the request, it must comply (absent a privilege). Trial courts need not interrupt the grand jury process with lengthy, free-wheeling "relevance" hearings. And as we showed in our opening brief, the "no conceivable relevance" standard comports with both the language and the legislative history of Rule 17(c), which respondents do not address.

3. Respondents contend that they made a sufficient showing that the subpoenaed documents are irrelevant to the grand jury's investigation. Respondents claim that they met their burden by asserting, in affidavits, that neither of them did any business in Virginia.

As we explained in our opening brief (at 30-32), that allegation does not render the subpoenaed records irrelevant to the grand jury investigation. First, the grand jury was not required to accept respondents' assertions on faith, but was instead entitled to determine the facts for itself. *United States* v. *Morton Salt Co.*, 338 U.S. at 642-643. Moreover, out-of-state acts may be relevant as evidence of knowledge or intent on the part of Model Magazine or its owner, Martin Rothstein (who *did* transact business in Virginia); they may tend to prove overt acts in a conspiracy based in Virginia; or they may constitute aiding and abetting the substantive acts of others within the jurisdiction. More generally, we explained (U.S. Br. 8), the subpoenaed records might shed light on the relationship between respondents and Model, companies that the trial court noted were "all the same thing." Pet. App. 60a. Because the subpoenaed materials would plainly be relevant on any or all of those grounds, respondents' showing was inadequate, even under their proposed standard of mere "reasonableness."

Respondents contend that we may not assert those "theories of relevance" because we did not advance them in the district court, and because it is not "known whether any of these theories was the actual basis for issuance of the subpoena." Resp. Br. 47. That contention is meritless.

First, the government did advance those theories of relevance in the district court. In response to the motions to quash, the prosecutor explained that the grand jury was investigating allegations that obscene materials had been shipped into Virginia (C.A. App. 99-100); that Model Magazine was engaged in "the sale of sexually explicit video tape cassettes, which the grand jury believes may be obscene" (*id.* at 100); that some of Model's sales had taken place in Virginia (*id.* at 93 & n.8); and that respondents R. Enterprises and MFR Court Street Books did business at the same location as Model, were owned by the same person (Martin Rothstein), and were "all one and the same" (*id.* at 397, 476, 524-525, 642). The prosecutor explained that the grand jury "want[ed] to go out and look further at Mr. Rothstein and his organization." *Id.* at 476. In particular, the prosecutor noted, the "grand jury should be able to determine" such issues as "the relationship between Model" and the respondents; whether "assets generated by Model have been used to run [respondents] or vice-versa"; and whether respondents were merely "subterfuge corporation[s]" designed by Model "to transact its business either directly or indirectly into the Eastern District of Virginia." *Id.* at 397. Even if, as respondents asserted, their own business dealings took place outside Virginia, that was not dispositive; as the prosecutor noted, "such concepts as conspiracy and the rules of evidence" entitle the grand jury to seek documents relating to out-of-state transactions. *Id.* at 269.

On that record, the district court correctly denied respondents' motions to quash. Rejecting R. Enterprises' motion, Judge Cacheris found a "sufficient connection" between the company and Virginia, noting Rothstein's admission that R. Enterprises, MFR, and Model were "all the same thing." Pet. App. 60a. Judge Ellis reached the same conclusion in denying MFR's motion to quash, finding that the three companies were "related entities," at least one of which "certainly did ship sexually explicit material into the Commonwealth of Virginia." *Id.* at 63a.

Moreover, it does not matter whether any of the theories of relevance that we put forth in our brief "was the actual basis for issuance of the subpoena." Resp. Br. 47. The principal reason for the "no conceivable relevance" standard is precisely because it cannot be known, until the close of an investigation, what "actual" relevance, if any, a given record will have. As this Court has explained many times, the grand jury "does not depend on a case or controversy for power to get evidence but can investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not." *United States* v. *Morton Salt Co.*, 338 U.S. at 642-643. See also *United States* v. *Bisceglia*, 420 U.S. 141, 147-148 (1975); *United States* v. *Powell*, 379 U.S. 48, 57 (1964). The grand jury needs no "theory of relevance" in order to undertake an investigation, to pursue a lead, or to issue a subpoena. Accordingly, in deciding whether a subpoena recipient has discharged its burden of proving that the requested materials are irrelevant, a court cannot require the government to demonstrate that the grand jury actually had in mind the theory of relevance that is offered at the hearing. It is enough that the court can itself find that such a theory is available.

4. Respondents defend the court of appeals' decision on First Amendment grounds. They assert (Br. 12) that once a subpoena recipient makes "a prima facie showing of arguable First Amendment infringement," the government must then demonstrate that there is "a 'compelling state need' for the books and records sought and that they are 'substantially' related to the grand jury's investigation." Under this standard, respondents contend that the grand jury subpoenas for their corporate records were properly quashed.

We note at the outset that the court of appeals did not rely on First Amendment principles in quashing the subpoenas in this case. Indeed, the words "first amendment" do not appear in the relevant portions of the court's opinion. Rather, the court predicated its decision on a construction of Rule 17(c), holding that "any" record subpoenaed by the grand jury—whether or not related to First Amendment activity—"must be admissible as evidence at trial." Pet. App. 10a.

The court of appeals' reluctance to rely on First Amendment principles—even though respondents had argued the point below—was well founded. Creating a special rule of relevance for "records related to activities protected by the First Amendment" (Resp. Br. 15) is a process with no evident stopping point. If respondents—companies whose business involves the marketing of videotapes and other material—can shield their ordinary corporate records on First Amendment grounds, so too can any other company whose business involves, however tangentially, arguably protected material. A conglomerate which includes a book publishing division can, and undoubtedly will, make the same claim, if offered the special rule of relevance urged by respondents.

Moreover, there is no reason why respondents' novel standard of relevance would, or could, be limited to businesses asserting First Amendment protection. Any number of other interests—which likewise enjoy or could assert constitutional protection of one degree or another—could make similar assertions in response to a grand jury subpoena. Taken to the limits of its logic, respondents' standard might equally require the government to prove relevance when it subpoenas the records of minority-owned businesses, birth-control clinics, or the offices of state officials. As in *Branzburg* v. *Hayes*, 408 U.S. 665, 703 (1972), the Court should not "embark the judiciary on a long and difficult journey to * * * an uncertain destination."

In any event, for the reasons noted in our opening brief (at 27-30), First Amendment principles do not support the court of appeals' decision. As this Court explained in *Branzburg*, 408 U.S. at 682, "the First Amendment does not invalidate every incidental burdening of the press that may result from the enforcement of civil or criminal statutes of general applicability."[4] To the contrary, the Court has "held that generally applicable laws unconcerned with regulating speech that have the effect of interfering with speech do not thereby become subject to compelling-interest analysis under the First Amendment." *Employment Div., Dep't of Human Resources* v. *Smith*,

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[4] Respondents cite *Branzburg* (Br. 17-18) in support of their compelling-interest test. In a footnote (Br. 18 n.10), however, respondents acknowledge that the Court did not actually adopt that test in *Branzburg*. Indeed, in its more recent decision in *University of Pennsylvania* v. *EEOC*, 110 S. Ct. 577 (1990), the Court, describing its holding in *Branzburg*, noted that it had "indicated a reluctance to recognize a constitutional privilege" in that case (*id.* at 588).

110 S. Ct. 1595, 1604 n.3 (1990) (emphasis omitted). That is particularly so where, as here, the government has not sought to obtain protected materials, but has sought only the ordinary corporate records of an entity whose business happens to involve the production of arguably protected merchandise.[5]

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[5] Respondents assert that "[i]t would be a serious insult to the scholarship of this Court to suggest that all the carefully constructed procedures governing the investigation of magazines and films somehow don't apply when dealing with corporate records essential for the distribution of the films." Br. 25-26. But this Court's decisions "have long recognized that the seizure of films or books on the basis of their content implicates First Amendment concerns not raised by other kinds of seizures." *New York* v. *P.J. Video, Inc.*, 475 U.S. 868, 873 (1986). For that reason, the Court has "required that certain special conditions be met before such seizures may be carried out." *Ibid.* Conversely, the Court has refused to devise specially strict standards for searches of ordinary corporate records, simply because the business in question happens to produce materials protected by the First Amendment. *Zurcher* v. *Stanford Daily*, 436 U.S. 547, 563-567 (1978).

In support of their contrary view, respondents rely principally (Br. 25) on two 1972 opinions by Judge Edward Weinfeld. *G.I. Distributors, Inc.* v. *Murphy*, 336 F. Supp. 1036 (S.D.N.Y.); *Star Distributors, Ltd.* v. *Hogan*, 337 F. Supp. 1362 (S.D.N.Y.). In those cases, Judge Weinfeld concluded that seizures that had effectively deprived certain book publishers of all of their merchandise and records were constitutionally overbroad. Judge Weinfeld was, however, careful to distinguish the seizures at issue in those cases from such "less intrusive means of obtaining the evidence, such as the use of the subpoena power." *Star Distributors*, 337 F. Supp. at 1364. In any event, as respondents acknowledge in a footnote (Br. 26 n.21), the leading of the two cases, *G.I. Distributors*, was reversed by the court of appeals. *G.I. Distributors* v. *Murphy*, 469 F.2d 752 (2d Cir. 1972), vacated on other grounds, 413 U.S. 913, decision adhered to on remand, 490 F.2d 1167 (2d Cir. 1973).

This Court's recent decision in *University of Pennsylvania* v. *EEOC*, 110 S. Ct. 577 (1990), illustrates the point in a closely related context. In that case, the EEOC issued a subpoena seeking certain tenure-review files in the possession of the University of Pennsylvania. The University resisted compliance, in part on the ground that production of the materials would compromise their confidentiality, thereby inhibiting the University's First Amendment right to academic freedom. This Court unanimously rejected that contention and enforced the subpoena. The Court explained that "by comparison with the cases in which we have found a cognizable First Amendment claim, the infringement the University complains of is extremely attenuated." *Id.* at 587.[6] "Indeed," the Court added, "if the University's attenuated claim were accepted, many other generally applicable laws might also be said to infringe the First Amendment." *Id.* at 588. At bottom, the Court observed, the University asserted simply that compliance with the subpoenas would make the peer review process more difficult; "[b]ut many laws make the exercise of First Amendment rights more difficult." *Ibid.*[7] What is more, the Court added, the Univer-

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[6] In particular, the Court observed, the University "argues that the First Amendment is infringed by disclosure of peer review materials because disclosure undermines the confidentiality which is central to the peer review process, which in turn is the means by which petitioner seeks to exercise its asserted academic-freedom right of choosing who will teach." 110 S. Ct. at 587-588.

[7] "For example," the Court noted, "a university cannot claim a First Amendment violation simply because it may be subject to taxation or other government regulation, even though such regulation might deprive the university of revenue it needs to bid for professors who are contemplating work-

sity's First Amendment claim was "speculative," since the subpoenas might have little, if any, actual impact on the peer review process. "Thus," the Court stated, "the 'chilling effect' petitioner fears is at most only incrementally worsened by the absence of a privilege." *Ibid.* Relying on *Branzburg* for the general proposition that "the First Amendment does not invalidate every incidental burdening of the press that may result from the enforcement of civil or criminal statutes of general applicability" (*ibid.*), the Court enforced the subpoenas without requiring the government to make any special showing of need.

Respondents' First Amendment claim fails for the same reasons. First, the infringement claimed in this case "is extremely attenuated." *University of Pennsylvania*, 110 S. Ct. at 587. Respondents complain that "[o]nce suppliers know that a customer is under criminal investigation, they will understandably be reluctant to ship merchandise, recognizing that they may be exposing themselves to a far-off criminal investigation." Br. 12. Presumably, respondents believe that the existence of the investigation will become widely known, thereby discouraging suppliers from doing business with respondents, and in turn preventing respondents from engaging in First Amendment activity.

"To verbalize th[at] claim is to recognize how distant the burden is from the asserted right." *University of Pennsylvania*, 110 S. Ct. at 588. Like the University, respondents contend simply that the subpoenas in this case may make their business more difficult to conduct. But virtually any aspect of the criminal process may have such an effect. If, as respondents urge, the First Amendment is infringed by the very fact that "a customer is under criminal investigation" (Br. 12), the government would be required to meet the compelling-interest test not only when it issues a grand jury subpoena, but also when it opens an investigation, interviews a witness, or conducts informal discovery. In each instance, a supplier may learn that its customer is under investigation; yet it would be wholly impracticable to require the government to make a compelling-interest showing before it may undertake such routine investigative measures.

ing for other academic institutions or in industry." 110 S. Ct. at 588.

Respondents' First Amendment theory is also highly "speculative." *University of Pennsylvania*, 110 S. Ct. at 588. Whether, and to what extent, suppliers would react as respondents predict depends, first and foremost, on the suppliers' knowledge of the underlying investigation. Grand jury secrecy rules may be expected to limit any publicity surrounding the investigation. Compare *Branzburg* v. *Hayes*, 408 U.S. at 700 (grand jury secrecy "is a further protection against the undue invasion of [First Amendment] rights"), with *Brown* v. *Socialist Workers '74 Campaign Comm.*, 459 U.S. 87, 97-98 n.14 (1982) (public records of contributors and recipients of campaign funds); *Shelton* v. *Tucker*, 364 U.S. 479, 486 & n.7 (1960) (public exposure of associations of school teachers); *Thornburgh* v. *American College of Obstetricians & Gynecologists*, 476 U.S. 747, 765-767 (1986) (public exposure of details of abortions). Moreover, the use of a subpoena, rather than a search warrant, to secure the requested materials should reduce both the intrusiveness of the investigation and any attendant publicity. See *United States* v. *Miller*, 425 U.S. 435, 446 n.8 (1976); *United States* v. *Dionisio*, 410 U.S. at 9-12. And even if the

investigation becomes public, suppliers may not uniformly elect to withhold their business; indeed, respondents do not point to any suppliers that have withdrawn their business as a result of this investigation. See *University of Pennsylvania*, 110 S. Ct. at 588 (quoting *Branzburg*, 408 U.S. at 693) (the Court is "reluctan[t] to recognize a constitutional privilege where it was unclear how often and to what extent informers are actually deterred from furnishing information when newsmen are forced to testify before a grand jury").[8]

* * * * *

The decision of the court of appeals threatens to "saddle [the] grand jury with minitrials and preliminary showings" that will "assuredly impede its investigation and frustrate the public's interest in the fair and expeditious administration of the criminal laws." *United States* v. *Dionisio*, 410 U.S. 1, 17 (1973). The history of this case provides an excellent illustration of that danger. The subpoenas to R. Enterprises and MFR Court Street Books were first issued in April 1988. Nearly two and one-half years later, respondents have yet to produce the required documents. The court of appeals' decision strongly encourages such delaying tactics, and should be reversed.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

SEPTEMBER 1990

[8] In this respect, among others, respondents' First Amendment claim differs from the free association claim successfully pressed in *NAACP* v. *Alabama*, 357 U.S. 449 (1958). In that case, the Court invalidated the compelled disclosure of the NAACP's membership lists, concluding that the production order "entail[ed] the likelihood of a substantial restraint upon the exercise by petitioner's members of their right to freedom of association." *Id.* at 462. The Court noted that the organization had made "an uncontroverted showing that on past occasions revelation of the identity of its rank-and-file members has exposed these members to economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility." *Ibid.* See also, *e.g.*, *Gibson* v. *Florida Legislative Investigation Comm.*, 372 U.S. 539, 549 (1963) (compelled disclosure of membership lists "will seriously inhibit or impair the exercise of constitutional rights").

By contrast, respondents simply assert, without apparent support, that the mere initiation of a criminal investigation will coerce their suppliers into withdrawing patronage. But "[b]are allegations of possible first amendment violations are insufficient to justify judicial intervention into a pending investigation." *Dole* v. *Milonas*, 889 F.2d 885, 891 (9th Cir. 1989).

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

No. 89-1436

UNITED STATES OF AMERICA,
Petitioner,

v.

R. ENTERPRISES, INC. and
MFR COURT STREET BOOKS, INC.,
Respondents.

**On Writ of Certiorari to the
United States Court of Appeals
for the Fourth Circuit**

BRIEF OF AMICUS CURIAE PHE, INC., IN SUPPORT OF RESPONDENTS

INTEREST OF *AMICUS*[1]

PHE, Inc. ("PHE") is a North Carolina corporation that is engaged, with sister corporations, in the business of mailing throughout the Nation various materials protected by the First Amendment, including sexually explicit magazines and videotapes, materials advocating the use of contraceptives, a medical newsletter (edited by a physician) entitled *Sex Over Forty*, and a newspaper entitled *Executive Health Report*. PHE's sexually explicit speech is sent only to adults, and only on request.

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[1] Petitioner and respondents both have consented to the filing of this *amicus* brief. Their letters of consent are being lodged with the Clerk.

PHE has taken great care to assure compliance with state and federal obscenity laws. In addition to conducting rigorous screening procedures, including review and approval of all sexually explicit materials by independent psychologists, psychiatrists and sociologists, the company has met with law enforcement officials and sought their advice to ensure that no obscene material is distributed by PHE. PHE has strictly abided by the advice it has received.

Despite these efforts, PHE has been the target of inquiry by various federal prosecutors across the country for possible violations of the federal obscenity laws. PHE recently obtained a preliminary injunction barring the Department of Justice's National Obscenity Enforcement Unit from pursuing simultaneous prosecutions against PHE in multiple jurisdictions. The injunction was based on a *prima facie* showing that the government was acting in bad faith calculated to suppress PHE's constitutionally protected activities. *PHE, Inc. v. United States Department of Justice*, Civ. Action No. 90-0693 (D.D.C. July 23, 1990).

One jurisdiction in which the Department has threatened to bring an indictment against PHE is the Western District of Kentucky. On January 30, 1990, a federal grand jury, working with federal prosecutors in the District, issued to PHE a subpoena to produce certain films, magazines and corporate records. The government withdrew the subpoena, after PHE moved to quash under Rule 17(c) of the Federal Rules of Criminal Procedure. On April 26, 1990, however, PHE was served with a second grand jury subpoena, which differs only slightly from the previous subpoena. Although it no longer seeks specific expressive materials, the subpoena demands production of numerous documents relating to the acquisition and distribution of 10 named films and 9 specific magazines. In addition, the subpoena requires PHE to produce essentially all of its business records, including correspondence with customers and organizations. Invoking Rule 17(c) and the First and Fourth Amendments to the Constitution, PHE has again moved to quash the subpoena. In support of its motion, PHE maintains, *inter alia*, that the subpoena impermissibly chills its First Amendment rights. The District Court for the Western District of Kentucky, recognizing the similarities between the subpoenas at issue there and in this case, has decided to defer ruling on PHE's motion to quash pending the Court's determination in this case. *See In re Grand Jury Subpoena Duces Tecum Served upon PHE, Inc.*, Order (W. D. Ky. Aug. 21, 1990). Thus, *amicus* has a substantial interest in the outcome of this case.

PHE's experience has made it acutely aware of the threat to free expression posed by the federal government's tactics in investigating obscenity charges. As a nationwide distributor of expressive materials, PHE is concerned and deeply affected by government investigative practices that burden its rights or the rights of others to engage in expressive conduct. It wishes to participate in this case to explain the narrow and reasonable basis of the court of appeals' decision under review, and to highlight the First Amendment concerns raised by grand jury subpoenas directed at speakers under investigation for possible commission of speech-related crimes.

SUMMARY OF ARGUMENT

The court of appeals utilized the correct standard in analyzing respondents' claim that the grand jury subpoenas requesting their corporate documents should be quashed pursuant to Rule 17(c) of the Federal Rules of Criminal Procedure. Rule 17(c)'s prohibition on "unreasonable" subpoenas dictates that the evidence sought be relevant to a legitimate grand jury investigation. Consistent with the approach adopted by the majority of other circuits that have addressed the issue, the court of appeals held that when the recipient of a grand jury subpoena duces tecum makes a substantial showing that the material demanded is not relevant to the grand jury's investigation, the government must then produce some evidence of relevance in order to compel compliance with the subpoena. This distribution of burdens strikes the appropriate balance between the effective functioning of the grand jury and the recipient's right to be protected from unreasonable grand jury subpoenas.

The court of appeals correctly applied this analysis in this case. Respondents satisfied their initial burden of demonstrating to the court that the subpoenaed documents are unlikely to have any relevance to the grand jury's investigation into possible obscenity violations in Virginia. The government made no showing in response. Accordingly, the subpoena was correctly quashed. Point I.A.

The court of appeals' statements regarding the necessity under Rule 17(c) that subpoenaed material be admissible at trial is merely dictum. The court's disposition of Model Magazine Distributor's motion to quash makes clear that the court does not require the government to make a threshold showing of admissibility. Moreover, the potential admissibility of the documents requested of respondents had no bearing on the court's holding under review. Point I.B.

If this Court rules that a grand jury subpoena can survive a motion to quash when the government makes no showing of relevance whatsoever, despite respondents' substantial initial showing of irrelevance, reversal is nonetheless inappropriate. Respondents, who are engaged in constitutionally protected expressive activities, raise a valid First Amendment claim. This Court has repeatedly instructed that the government cannot pursue criminal (especially obscenity) investigations in a manner that would abridge First Amendment rights, even if identical techniques are permissible in other contexts. There is no exception for grand jury investigative tools, such as subpoenas duces tecum. Where the recipient of a grand jury subpoena makes a prima facie showing that the subpoena would likely infringe First Amendment rights, the government must then demonstrate that the subpoena is substantially related to a compelling governmental interest and burdens those rights no more than is necessary. Point II.A.

A subpoena duces tecum issued in connection with a grand jury investigating possible violations of obscenity laws could abridge the recipient's First Amendment rights in numerous ways. For example, a subpoena demanding production of specified sexually oriented expressive materials, without a prior finding that they are (or are likely to be) obscene, is likely to chill the recipient's constitutional right to distribute materials presumptively protected by the First Amendment. A subpoena requesting business records directly related to specified sexually oriented expressive materials will likely have the same effect. If the subpoena of corporate documents is so broad that production would interfere significantly with the recipient's ability to engage in expressive activities, the First Amendment prohibition against prior restraints would be implicated. A recipient's prima facie showing that any of these infringements is likely to result from a grand jury subpoena triggers compelling-interest analysis. Point II.B.

Because the court of appeals did not reach respondents' First Amendment claim, it did not decide whether respondents have made the requisite prima facie showing. Accordingly, the appropriate course of action—if the Court rules that Rule 17 does not require any showing of relevance from the government—is to remand to the court of appeals for consideration of respondents' First Amendment objections to the subpoenas. Point II.C.

ARGUMENT

I. THE COURT OF APPEALS CORRECTLY HELD THAT BECAUSE RESPONDENTS MADE A SUBSTANTIAL SHOWING THAT THE SUBPOENAED MATERIAL WAS IRRELEVANT TO THE GRAND JURY INVESTIGATION, AND THE GOVERNMENT THEN FAILED TO MAKE *ANY* SHOWING OF RELEVANCE, THE GOVERNMENT FAILED TO MEET ITS OBLIGATION UNDER RULE 17(c) OF THE FEDERAL RULES OF CRIMINAL PROCEDURE TO DEMONSTRATE THE RELEVANCE OF THE SUBPOENAED DOCUMENTS.

The federal grand jury's "investigative powers are necessarily broad," *Branzburg v. Hayes*, 408 U.S. 665, 688 (1972), but they are "not unlimited," *United States v. Dionisio*, 410 U.S. 1, 9 (1973). The grand jury does not have unbridled discretion to compel the production of evidence.[2] Both the Fourth Amendment and Rule 17(c) of the Federal Rules of Criminal Procedure prohibit "unreasonable" subpoenas. *Hale v. Henkel*, 201 U.S. 43, 73 (1906). The "reasonableness" standard imposes different limitations on grand jury subpoenas, depending upon the context. But as this Court's decisions demonstrate, it at least requires that the evidence sought be relevant to a legitimate grand jury investigation.[3] No court has upheld grand jury fishing expeditions undertaken in the mere hope that incriminating evidence will surface.

[2] For example, grand jury subpoenas are subject to challenge for overbreadth. *See, e.g., Oklahoma Press Pub. Co. v. Walling*, 327 U.S. 186, 208 (1946); *In re Grand Jury Subpoena: Subpoena Duces Tecum*, 829 F.2d 1291, 1297-1298 (4th Cir. 1987); *In re Grand Jury Proceedings*, 601 F.2d 162 (5th Cir. 1979).

In *Zurcher v. Stanford Daily*, for example, the Court observed that an investigatory subpoena is justified and can withstand a motion to quash *if* the material demanded is "sufficiently relevant." 436 U.S. 547, 567 (1978). The Court noted that this showing would "very likely" be made if the evidence sought is "sufficiently connected with the crime to satisfy the [warrant] probable-cause requirement." *Id.* Similarly, in *Branzburg v. Hayes*, the Court held that a newsman subpoenaed to testify before a grand jury must appear and answer questions put to him, but "subject of course, to the supervision of the presiding judge as to . . . the pertinence of the probable testimony." 408 U.S. at 709 (internal quotes omitted). And in *Hale*, the Court concluded that a grand jury subpoena duces tecum that is unnecessarily sweeping in its scope is unreasonable. 201 U.S. at 76. To subpoena massive amounts of corporate documents, the Court held, the *government* must show "some necessity" to "the prosecution of [the] case" or "some evidence of their materiality." *Id.* at 77.[4]

[3] Petitioner's suggestion that Rule 17(c) focuses only on the burdensomeness of production under a challenged subpoena misses the mark. *See* Pet. Br. at 18. Rule 17(c)'s authorization to quash a subpoena if compliance would be "oppressive" does address this aspect of improper subpoenas. But the "reasonableness" standard, like that derived from the Fourth Amendment, focuses on other concerns, as well. For example, it requires that the subpoena specify the materials to be produced with sufficient particularity, and seek materials covering only a reasonable period of time. *See, e.g., Oklahoma Press Publishing Co. v. Walling*, 327 U.S. at 209.

[4] In discussing the constraints imposed by the Fourth Amendment on investigatory subpoenas issued by the Federal Trade Commission, the Court in *Federal Trade Commission v. American Tobacco Co.* remarked that "[i]t is contrary to the first principles

In the portion of its decision under review, the court of appeals held only that under Rule 17(c), when the recipient of a grand jury subpoena duces tecum makes a substantial initial showing that the material demanded is not relevant to the grand jury's investigation, the government must then produce "some evidence" of relevance in order to compel compliance with the subpoena. *In re Grand Jury 87-3 Subpoena Duces Tecum*, 884 F.2d 772, 777 (4th Cir. 1989).

Perhaps because the actual holding of the court of appeals does not present any issue worthy of review, petitioner consistently mischaracterizes the court of appeals' holding, in several key respects. First, petitioner incorrectly argues that the court of appeals required the government to make a "threshold showing" of relevance. Pet. Br. at 23. Second, petitioner inaccurately argues that the standard established by the court is one of "trial relevance." *Id.* at 26. Third, petitioner mistakenly describes the court's holding as obligating the government to demonstrate that the information sought will be *admissible* at a future trial. *E.g.*, *id.* at 5. In fact, however, the court of appeals' holding is much narrower than that, and is entirely consistent with the "majority rule" endorsed by petitioner.[5] The court's decision establishes the appropriate standard for resolving a claim that the material demanded by the grand jury is irrelevant, and that compelled compliance with the subpoena would therefore be "unreasonable or oppressive" under Rule 17(c).

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of justice to allow a search through all [a corporation's] records, relevant or irrelevant, in the hope that something will turn up." 264 U.S. 298, 306 (1924). *See also United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950) (the information sought by an administrative subpoena must be "reasonably relevant"). The powers of the FTC are analogous to those of a grand jury. *Id.* at 652-653.

[5] For this reason, the Court may properly decide to dismiss the writ of certiorari as improvidently granted. *See, e.g., Bankers Life and Cas. Co. v. Crenshaw*, 486 U.S. 71, 108 S. Ct. 1645, 1649-1650 (1988); *Miskkin v. New York*, 383 U.S. 502, 512-514 (1966).

A. The Rule Established and Properly Applied by the Court of Appeals Is Consistent with the Rule Applied by the Majority of Other Circuits and with Principles Announced by This Court.

Petitioner incorrectly argues that "[l]ike the rule in the Third and Tenth Circuits, the Fourth Circuit's decision in the present case imposes a *threshold obligation* on the government to establish the relevance of the subpoenaed records." Pet. Br. at 23 (emphasis added). This purported obligation can be located nowhere in the language or holding of the court. Unlike the Third Circuit, which has explicitly stated that the government must make a *preliminary* showing of relevance in *every case* in which a grand jury subpoena duces tecum is resisted, *e.g.*, *United States v. Oliva*, 611 F.2d 23, 24-25 (3d Cir. 1979),[6] the Fourth Circuit did not explain when the government's obligation to demonstrate some relevance is triggered. However, the court of appeals' actual holding demonstrates that this obligation arises only *after* the recipient of the subpoena makes a substantial showing that the material sought is not relevant to a legitimate grand jury investigation, because that is the precise context in which the court made its decision. Respondents *had* submitted affidavits and other evidence that de-

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[6] The Third Circuit has imposed a rule requiring the government "to make some *preliminary* showing by affidavit that each item [sought in the subpoena] is at least relevant to an investigation being conducted by the grand jury and properly within its jurisdiction, and is not sought primarily for another purpose." *In re Grand Jury Proceedings (Schofield I)*, 486 F.2d 85, 93 (3d Cir. 1973) (emphasis added). *See also Matter of Grand Jury Subpoena Duces Tecum Issued on June 9, 1982*, 697 F.2d 277, 281 (10th Cir. 1983) (adopting "Schofield" rule). The Third Circuit has explained that it is enforcement proceedings—either civil contempt proceedings under 28 U.S.C. § 1826(a) or motions to quash under Rule 17(c)—that give rise to the government's obligation in that court to file a "Schofield" affidavit. *In re Grand Jury Proceedings (Harrisburg Grand Jury)*, 658 F.2d 211, 215 n.3 (3d Cir. 1981); *In re Grand Jury Empanelled October 18, 1979 (Hughes)*, 633 F.2d 282, 287 (3d Cir. 1980).

nied any connection between the companies and Virginia, and that evidence convinced the court (absent any contrary showing by the government) that the records of those companies were not "relevant to a grand jury investigation in the Eastern District of that state." 884 F.2d at 777.

Indeed, the court of appeals' decision in this very case regarding Model Magazine Distributor's motion to quash clearly and fatally undermines petitioner's characterization of the "rule" established by the court. Unlike respondents, Model did not make a sufficient showing to convince the court that the documents subpoenaed from it were irrelevant. The court therefore affirmed the district court's refusal to quash the subpoena requesting Model's corporate records *even though* the government had made absolutely no threshold showing of the relevance of those documents to the grand jury's investigation. *See* 884 F.2d at 776. Clearly, in the Fourth Circuit, the government's obligation to demonstrate some relevance is not triggered until the recipient makes an initial showing to the court that the material demanded is or is likely to be irrelevant.

Moreover, as the court of appeals' repeated statements and specific holdings make clear, the government's obligation is then merely to provide some evidence of "the relevancy of [the requested material] *to the grand jury's investigation*," 884 F.2d at 776 (emphasis added). *See id.* (finding that the documents requested of Model are relevant "to this investigation"); *id.* 777 (holding that the government had not shown that the documents requested of respondents are "relevant to a grand jury investigation"). Under the Fourth Circuit's holding, the government need *not* "prove that the requested documents are relevant . . . to the likely charges at trial"—as petitioner asserts. Pet. Br. at 23.

The Fourth Circuit's holding is entirely consistent with the approach adopted by other circuits. With the exception of the Third and Tenth Circuits, which have exercised

their *supervisory* powers to impose a threshold obligation on the government,[7] courts have placed the initial burden on the subpoena recipient to make a showing of irrelevance before the government must respond with some showing that the grand jury is seeking relevant evidence. *See* 2 S. Beale & W. Bryson, Grand Jury Law and Practice, § 6:28 at 184 & n.12 (1986 & Supp. 1989).[8] The

[7] The Third Circuit imposed the "Schofield" affidavit requirement under its "supervisory power over the grand jury and over the district court's enforcement of subpoenas." *In re Grand Jury Proceedings (Schoefield II)*, 507 F.2d 963, 966 (3d Cir. 1975), *cert. denied*, 421 U.S. 1015 (1975). *Accord id.* at 964 & n.2; *Schofield I*, 468 F.2d at 93; *Harrisburg Grand Jury*, 658 F.2d at 213 (declining to extend "Schofield" rule to subpoenas to appear before a grand jury or to criminal contempt proceedings). With the exception of the Tenth Circuit, all other circuits that have addressed the issue have declined to exercise their supervisory power to impose such a threshold obligation. *See* cases cited in Pet. Br. at 22 n.17.

Despite petitioner's attempts to motivate this Court to overrule *Schofield* and its progeny, the question of whether the Third Circuit may exercise its supervisory power to specify the particular way in which relevancy and proper purpose of a grand jury investigation shall be shown in that circuit is not properly before this Court. In the decision under review, the Fourth Circuit did not purport to act pursuant to its supervisory authority; it invoked only Rule 17(c). Indeed, there may be reason to believe that the court would not exercise its supervisory power to adopt the "Schofield" rule. *See Re Special Grand Jury No. 81-1 (Harvey)*, 697 F.2d 112 (4th Cir. 1982) (*en banc*), vacating 676 F.2d 1005 (4th Cir. 1980) (which imposed a "Schofield" obligation in response to a claim of attorney-client privilege). The Court should review the propriety of the "Schofield" supervisory doctrine only in a case in which the doctrine has been applied.

[8] The Fifth and Eleventh Circuits, for example, have declined to require a "Schofield" affidavit, or similar showing, unless the subpoena recipient makes some showing of "harrassment or prosecutorial misuse of the system." *In re Grand Jury Investigation (McLean)*, 565 F.2d 318, 320 (1977); *In re Grand Jury Proceedings (Guerrero)*, 567 F.2d 281, 283 (1978). *See also In re Grand Jury Proceedings (Bank of Nova Scotia)*, 691 F.2d 1384, 1387 & n.4 (11th Cir. 1982) (adopting Fifth Circuit approach), *cert. denied*, 462 U.S. 1119 (1983). The Ninth Circuit has said that it will not adopt the

"majority rule"—which petitioner advocates, Pet. Br. at 16—requires the government to make some showing of relevance once the recipient meets his initial burden. Under the majority rule, once the recipient makes an initial showing of irrelevance, the government is not entitled to stand mute and make *no* showing of relevance—as it steadfastly maintained in this case below—and still compel production.

For example, under the majority rule, as applied in the Second Circuit, if the recipient of the subpoena "come[s] forward with enough information to prove that it is unlikely that the materials sought are relevant to the investigation," he has "shift[ed] the burden to the government" to show the relevance of the requested material. *In re Grand Jury Subpoena Duces Tecum to John Doe Corp.*, 570 F. Supp. 1476, 1480 (S.D.N.Y. 1983), relying upon *In re Horowitz*, 482 F.2d 72, 80 (2d Cir. 1973) (holding that where there is reason to doubt the relevance of the subpoenaed documents, "the government must make a minimal showing that, in light of other evidence that has been obtained, the [material] may be relevant to the grand jury's investigation of a federal crime"), *cert. denied*, 414 U.S. 867 (1973).[9] The Sixth Circuit follows a similar rule: the government must "make a

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Third Circuit's "Schofield" rule, *e.g.*, *In re Grand Jury Proceedings*, 721 F.2d 1221, 1223 (1983), but has not addressed the issue of what the proper rule is where the subpoena recipient makes an initial showing that the information sought is likely not relevant.

[9] Under the Second Circuit's approach, "[i]f the [recipient] does not come forward with enough evidence to shift the burden, then the [recipient] bears the burden of showing that the documents sought 'can have no conceivable relevance to any legitimate object of investigation by the federal grand jury.'" *In re Grand Jury Subpoena Duces Tecum to John Doe Corp.*, 570 F. Supp. at 1480, quoting *In re Horowitz*, 482 F.2d at 80, and citing *In re Grand Jury Subpoena Served Upon New York Law School*, 448 F. Supp. 822, 823 (S.D.N.Y. 1978) and *In re Morgan*, 377 F. Supp. 281, 284 (S.D.N.Y. 1974). *See In re Liberatore*, 574 F.2d 78, 83 (2d Cir. 1978).

showing that the information sought is minimally relevant to the grand jury investigation [once] the party who seeks to quash the subpoena makes a showing of irrelevancy or prosecutorial abuse." *In re Grand Jury Proceedings, John Doe (Weiner)*, 754 F.2d 154, 155 (6th Cir. 1985.)[10]

In light of the presumption of regularity generally recognized as attaching to actions of the grand jury,[11] it is appropriate to place the *initial* burden on the recipient to challenge a subpoena duces tecum on relevancy grounds. If the recipient can overcome this presumption, however, by demonstrating to the court that "it is unlikely that the materials sought are relevant to the investigation," then the burden properly shifts to the government to make *some showing* of relevance. If the information sought is conceivably relevant to some legitimate inquiry of the grand jury, the government should easily be able to meet that minimal burden.[12] The threshold showing required of the subpoena recipient is formidable, whereas the re-

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[10] *See also In re Grand Jury Subpoena (Battle)*, 748 F.2d 327, 330 (6th Cir. 1984) (holding that after the objector makes a showing "that the information sought bears no conceivable relevance to any legitimate object of investigation by the federal grand jury, . . . the Government [is] required to make a minimal showing of the relevancy of [the] subpoenaed evidence") (internal quotes omitted), citing *In re Horowitz*, 482 F.2d at 79-80, and *In re Liberatore*, 574 F.2d at 82-83.

[11] *See, e.g., United States v. Lisinski*, 728 F.2d 887, 893 (7th Cir.), *cert. denied*, 469 U.S. 832 (1984); *see also Hamling v. United States*, 418 U.S. 87, 139 n.23 (1974).

[12] A rule that would require the recipient to prove that "the documents lack any conceivable relevance to a legitimate subject of grand jury investigation," as petitioner suggests, Pet. Br. at 17, would be unnecessarily stringent. It would force the party with the least amount of information concerning the grand jury's investigations and possible federal crimes at issue to prove a negative. This Court has not hesitated to place burdens on the government in similar contexts. *See Hale v. Henkel*, 210 U.S. at 77.

sponsive burden placed on the government is minimal.[13] This distribution of burdens adequately discourages the proliferation of disruptive "minitrials and preliminary showings," eschewed by the Court, *United States v. Dionisio*, 410 U.S. at 17, while protecting the recipient from unreasonable grand jury subpoenas.

The Fourth Circuit correctly applied this analysis in this case. Respondents satisfied their initial burden of showing, with evidence, that the subpoenaed material was unlikely to have any relevance to the grand jury proceeding. At that point, the burden shifted to the government to make some minimal showing of relevance. Although petitioner seeks to undermine the court's refusal to compel compliance by *now* arguing the potential relevance of the material, it made none of those arguments below. The government offered no showing whatsoever. In these circumstances, the court correctly held that the government had failed to meet its burden and the subpoena must be quashed.

B. The Fourth Circuit's Language, In Dictum, Regarding the Admissibility of the Subpoenaed Documents Had No Bearing on Its Judgment.

Petitioner ardently attacks the court of appeals' purported adoption of a rule that a grand jury subpoena duces tecum can be enforced only if the government makes

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[13] The government need not demonstrate that the grand jury has a firm basis to believe that the evidence will, in fact, provide proof of the commission of a particular crime. *Cf. Blair v. United States*, 250 U.S. 273, 281 (1919). The government need only show that there is a possibility that the material will expose evidence of the commission of a federal crime. One of the cases relied upon by petitioner explains that the government has the burden of establishing (1) the existence of a grand jury investigation; (2) the generic nature and subject matter of that investigation; and (3) the fact that the subpoenaed documents bear a general relation to that subject matter. *In re Grand Jury Subpoenas Duces Tecum Addressed to Certain Executive Officers of M.G. Allen & Assoc.*, 391 F. Supp. 991, 997 (D.R.I. 1975).

a threshold showing that the requested documents would be admissible at trial. This "rule" cannot be gleaned from the court's holding, however. To the contrary, the court upheld the district court's refusal to quash the subpoena requesting Model's corporate records, even though there had been no showing whatsoever by the government that the documents would be admissible at trial; nor did the court find them admissible. *See* 884 F.2d at 776.

The court did opine that "any documents subpoenaed under Rule 17(c) must be admissible as evidence at trial." *Id.* at 777. But this statement—whatever its meaning—is merely dictum. Contrary to petitioner's contention, the court did *not* hold that the grand jury subpoena of respondents' corporate documents should be quashed because the documents would be inadmissible at trial. Indeed, the court did not even reach that conclusion. Rather, it simply "note[d]" that the documents would "most likely" be inadmissible. *Id.*

This Court "'reviews judgments, not statements in opinions.'" *FCC v. Pacifica Foundation*, 438 U.S. 726, 734 (1978), quoting *Black v. Cutter Laboratories*, 351 U.S. 292, 297 (1956). The Court "look[s] beyond the broad sweep of the language and determine[s] . . . precisely the ground on which the judgment rests." *Black v. Cutter Laboratories*, 351 U.S. at 298. The court's actual holding in the portion of its decision under review rests *solely* on its conclusion that the government failed to sustain its burden of demonstrating "the relevancy of [respondents' corporate] documents to the grand jury's investigation." 884 F.2d at 776 (describing this as the court's "only concern"); *id.* at 774 (explaining that it "find[s] . . . that the government failed to demonstrate the relevance of [respondents'] corporate records" and reverses the district court "[f]or these reasons"). Whatever disagreement petitioner and this Court might have with the Fourth Circuit's dictum regarding the admissi-

bility at trial of the documents sought by the grand jury,[14] it does not require reversal in this case.

II. IF THE RECIPIENT OF A GRAND JURY SUBPOENA DUCES TECUM MAKES A PRIMA FACIE SHOWING THAT THE SUBPOENA IS LIKELY TO ABRIDGE ITS FIRST AMENDMENT RIGHTS, THE GOVERNMENT MUST THEN DEMONSTRATE THAT THE INFRINGEMENT IS NECESSARY TO FURTHER A COMPELLING GOVERNMENTAL INTEREST AND THAT THERE IS A SUBSTANTIAL RELATIONSHIP BETWEEN THE SUBPOENAED INFORMATION AND A LEGITIMATE GOVERNMENTAL GOAL.

Even if this Court were to rule that under Rule 17(c) of the Federal Rules of Criminal Procedure the government need make no showing of relevance whatsoever even though respondents had made an initial showing that the subpoenaed material is likely to be irrelevant to the grand jury's investigation, reversal would nonetheless be inappropriate. Whatever standard is applicable to enforcement of grand jury subpoenas under Rule 17, or in ordinary contexts, stricter standards pertain where compelled production would be likely to infringe First Amendment rights. Subpoenas—such as those at issue here—to produce material directly related to First Amendment activity, and that arise out of a federal grand jury investigation concerning the distribution of possibly obscene materials, raise significant First Amendment concerns.[15] If this Court reverses the court of appeals' holding founded on Rule 17, it must remand for consideration of respondents' First Amendment challenge to the subpoenas.

[14] *Amicus* does not advocate the adoption of a strict rule of admissibility regarding material subpoenaed by a federal grand jury. However, *amicus* notes that the legislative history of Rule 17 touted by petitioner, *see* Pet. Br. 19-20, did not hinder the Court in imposing an admissibility requirement for pretrial subpoenas in *United States v. Nixon*, 418 U.S. 683 (1974).

[15] In the District Court and on appeal, respondents squarely argued that compliance with the subpoenas for their corporate records would infringe their First Amendment rights. The court of appeals did not reach this issue. Nevertheless, in this Court, respondents may urge any ground to support the court's judgment whether or not it was relied upon or considered below. *See, e.g., United States v. Arthur Young & Co.*, 465 U.S. 805, 814 n.12 (1984).

A. Where A Grand Jury Subpoena Would Likely Infringe First Amendment Rights, the Government Must Demonstrate That the Subpoena Is Substantially Related to a Compelling Governmental Interest and Burdens Those Rights No More Than Is Necessary.

Respondents are engaged in constitutionally protected expressive activities. MFR Court Street Books is a small retail bookstore; R. Enterprises distributes videotapes. The sexually oriented books, videotapes, and other expressive material respondents distribute, including the materials on which the grand jury is focusing, have not been adjudged obscene and thus are presumptively protected by the First Amendment.[16] Booksellers and other distributors have a First Amendment right to sell expressive materials containing sexually explicit descriptions and images, so long as the works taken as a whole are not obscene or otherwise unprotected. *See Miller v. California*, 413 U.S. 15 (1973). The "constitutional guarantee of freedom of the press embraces the circulation of books as well as their publication." *Bantam Books, Inc. v. Sul-*

[16] Only a small portion of sexually oriented expression falls within the narrow category of constitutionally unprotected obscenity defined in *Miller v. California*. *See* 413 U.S. 15, 24 (1973). As this Court's careful delimitation of obscenity makes clear, "sex and obscenity are not synonymous." *Roth v. United States*, 354 U.S. 476, 487 (1957). Rather,

> [s]ex, a great and mysterious motive force in human life, has indisputably been a subject of absorbing interest to mankind through the ages; it is one of the vital problems of human interest and public concern. *Id.*

livan, 372 U.S. 58, 65 n.6 (1963) (citation omitted). *See FW/PBS v. City of Dallas*, 110 S. Ct. 596 (1990) (sale, exhibition, and distribution of sexually oriented expressive material is presumptively protected by the First Amendment); *Sable Communications of California, Inc. v. FCC*, 109 S. Ct. 2829, 2836 (1989) (sale to adults of materials containing indecent but not obscene sexual expression is protected by the First Amendment); *Smith v. California*, 361 U.S. 147, 152 (1959) (state has no power to "restrict the dissemination of books which are not obscene"); *Lovell v. City of Griffin*, 303 U.S. 444 (1938) (distribution of expressive material is constitutionally protected).

This constitutional guarantee requires that the government not pursue obscenity investigations in a manner that would abridge First Amendment rights, even if identical investigative techniques would be permissible in other contexts. Thus, this Court has held that searches and seizures, when applied to expressive materials, are subject to more stringent procedural safeguards than the identical governmental tools applied to non-expressive materials, such as drugs, where no First Amendment concerns are raised. *See, e.g., A Quantity of Copies of Books v. Kansas*, 378 U.S. 205, 211-212 (1964) (holding that standards governing searches and seizures of allegedly obscene books differ from those applied to other forms of contraband); *Marcus v. Search Warrant of Property*, 367 U.S. 717, 731 (1961) ("a State is not free to adopt whatever procedures it pleases for dealing with obscenity . . . without regard to the possible consequences for constitutionally protected speech"); *Roaden v. Kentucky*, 413 U.S. 496, 501 (1973) (holding that special rules apply to seizure of allegedly obscene material incident to arrest, explaining that "[a] seizure reasonable as to one type of material in one setting may be unreasonable in a different setting or with respect to another kind of material"). *See also Zurcher v. Stanford Daily*, 436 U.S. 547, 564 (1978) (where First Amendment interests are

at stake, "the requirements of the Fourth Amendment must be applied with scrupulous exactitude") (internal quotes omitted).

The same principles apply to investigative techniques employed by a grand jury.[17] As this Court recently made clear, "the invocation of grand jury interests is not 'some talisman that dissolves all constitutional protections.'" *Butterworth v. Smith*, 110 S. Ct. 1376, 1380 (1990), quoting *United States v. Dionisio*, 410 U.S. at 11. The Court has consistently instructed that "grand juries are expected to 'operate within the limits of the First Amendment.'" *Id.*, quoting *Branzburg v. Hayes*, 408 U.S. 665, 708 (1972). *See also Gibson v. Florida Legislative Investigation Comm.*, 372 U.S. 539 (1963) (holding that government must make a compelling-interest showing where compliance with legislative investigative subpoena of business records intrudes upon First Amendment right to free association).

The fact that the grand jury subpoena does not seek to restrict First Amendment rights directly "does not end inquiry into the *effect* of the production order. . . . In the domain of these indispensible liberties, whether of

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[17] In its investigatory capacity, the grand jury basically functions as a law enforcement agency. Grand jury subpoenas are essentially instrumentalities of the United States Attorney's office (or some other investigative or prosecutorial department of the Executive Branch). *See United States v. Martino*, 825 F.2d 754, 761 (3d Cir. 1987); *Doe v. DiGenova*, 779 F.2d 74, 80 (D.C. Cir. 1985); *United States v. Cleary*, 265 F.2d 459, 461 (2d Cir.), *cert. denied*, 360 U.S. 936 (1959). Subpoenas are issued in blank form by the clerk of the court under the court's name, so that the U.S. Attorney may simply fill them in. *See* Fed. R. Crim. P. 17(a). Federal prosecutors have the responsibility for deciding what evidence is subpoenaed. S. Beale & W. Bryson, *Grand Jury Law and Practice*, § 6:10 at 60 (1986 & Supp. 1989). *E.g., United States v. Santucci*, 674 F.2d 624, 627 (7th Cir. 1982), *cert. denied*, 459 U.S. 1109 (1983); *United States v. Kleen Laundry & Cleaners, Inc.*, 381 F. Supp. 519, 522-523 (E.D. N.Y. 1974) (citing cases). Indeed, the grand jury does not necessarily approve or even have knowledge of a subpoena prior to its issuance. *Doe v. DiGenova*, 779 F.2d at 80.

speech, press, or association, the decisions of this Court recognize that abridgement of such rights, even though unintended, may inevitably follow from varied forms of governmental action." *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 461 (1958) (emphasis added). *Accord, University of Pennsylvania v. EEOC*, 110 S. Ct. 577, 587 (1990) (agency subpoena duces tecum demanding university records); *Buckley v. Valeo*, 424 U.S. 1, 64-65 (1976).

Where grand jury activities are likely to abridge First Amendment rights—even indirectly—the court must balance those rights against the government's asserted interests. *Butterworth v. Smith*, 110 S. Ct. at 1380, citing *Branzburg v. Hayes*, 408 U.S. at 690-691; *Branzburg v. Hayes*, 408 U.S. at 710 (Powell, J., concurring); *Gibson v. Florida Legislative Investigation Comm.*, 372 U.S. at 545.[18] To justify enforcement of a grand jury subpoena that is likely to abridge First Amendment rights, the government must demonstrate a compelling interest, *NAACP v. Alabama*, 357 U.S. at 463, and a substantial relationship between the material sought and that interest, *id.* at 464. *See Pollard v. Roberts*, 283 F. Supp. 248, 256-257 (E.D. Ark.) (three-judge court), *aff'd*, 393 U.S. 12 (1968) (*per curiam*). As this Court has explained,

> [I]t is an essential prerequisite to the validity of an investigation which intrudes into the area of constitutionally protected rights of speech, press, association and petition that the [government] convincingly show a substantial relation between the information sought and a subject of overriding and compelling state interest.

[18] *See also, e.g., SEC v. MacGoff*, 647 F.2d 185, 191 (D.C. Cir.) (citing *Branzburg v. Hayes* and *Zurcher v. Stanford Daily*, and holding that in order to accommodate First Amendment rights of freedom of the press and of association, administrative subpoena requesting business records from newspaper publisher cannot include documentation relating to "editorial policy" or news gathering), *cert. denied*, 452 U.S. 963 (1981).

Gibson v. Florida Legislative Investigation Comm., 372 U.S. at 546. Moreover, "justifiable governmental goals may not be achieved by unduly broad means having an unnecessary impact on protected rights of speech, press, or association." *Branzburg v. Hayes*, 408 U.S. at 680-681.[19] The investigation must proceed "step by step . . . [and] an adequate foundation for inquiry must be laid before proceeding in such manner as" may inhibit First Amendment freedoms. *Gibson v. Florida Legislative Investigation Comm.*, 372 U.S. at 557. *See also Shelton v. Tucker*, 364 U.S. 469, 488-490 (1960).

This compelling-interest analysis is necessary whenever the subpoena recipient makes a prima facie showing that compelled production "has the potential for substantially infringing the exercise of First Amendment rights." *Buckley v. Valeo*, 424 U.S. at 66.[20] Requiring the govern-

[19] *See In re Grand Jury Proceedings*, 776 F.2d 1099, 1102-1103 (2d Cir. 1985) (grand jury subpoena to appear and testify implicating First Amendment right to freedom of association); *In re Grand Jury Subpoena to First Nat'l Bank, Englewood, Colo.*, 701 F.2d 115, 117 (10th Cir. 1983) (grand jury subpoena duces tecum implicating right to freedom of association); *Local 1814, Int'n'l Longshoremen's Ass'n v. Waterfront Comm'n*, 667 F.2d 267, 270-271 (2d Cir. 1981) (agency investigative subpoena duces tecum implicating right to freedom of association); *United States v. Citizens State Bank*, 612 F.2d 1091, 1094 (8th Cir. 1980) ("when the one summoned has shown a likely infringement of First Amendment rights, the enforcing courts must carefully consider the evidence of such an effect to determine if the government has shown a need for the material sought"); *Bursey v. United States*, 466 F.2d 1059, 1083 (9th Cir. 1972) (grand jury subpoena to appear and testify implicating First Amendment rights to freedom of the press and to association). *See also SEC v. MacGoff*, 647 F.2d at 191 ("some balancing or special sensitivity is required" in view of First Amendment implications of agency subpoena duces tecum directed at newspaper publisher).

[20] *NAACP v. Alabama* and *Gibson v. Florida Legislative Investigation Comm.* make clear that investigative subpoenas that likely abridge First Amendment rights are subject to compelling-interest analysis, regardless of the standard applicable to subpoenas in other contexts. Compelling-interest analysis is particularly appropriate

ment to then demonstrate need and a substantial relationship between the material demanded and a compelling governmental interest provides the requisite safeguard against possible governmental abuse of the grand jury subpoena process to suppress speech.[21]

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where, as here, the subpoena is issued in furtherance of an investigation into the possible commission of a speech-related offense—*e.g.*, obscenity. The subpoenas at issue here are aimed *directly* at respondents' expressive activities—the distribution of sexually oriented books and videotapes. *See Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 706 (1986) (the strictest level of First Amendment review pertains where "a significant expressive element drew the legal remedy in the first place"). Even if petitioner's view of this case as involving only "incidental" burdens were correct, the government would at least have to demonstrate that any infringement on First Amendment rights was "no greater than is *essential* to the furtherance of [a *substantial* governmental] interest." *United States v. O'Brien*, 391 U.S. 367, 377 (1968) (emphasis added).

[21] The cases relied upon by petitioner are not to the contrary. *See* Pet. Br. at 29. Respondents do not seek exemption from grand jury subpoenas by virtue of their involvement in First Amendment protected activities. *Compare Citizen Publishing Co. v. United States*, 394 U.S. 131 (1969) (media has no constitutional immunity to restrain trade in news and views); *Associated Press v. United States*, 326 U.S. 1, 19-20 (1945) (same). Respondents contend only that in determining whether, and to what extent, the subpoenas may be enforced, the government's interests must be balanced against their First Amendment rights. This is entirely consistent with this Court's holdings. *See Branzburg v. Hayes*, 408 U.S. at 690-691 (balancing interests and concluding that grand jury questions regarding reporters' contacts with informants would not chill press's First Amendment rights); *Zurcher v. Stanford Daily*, 436 U.S. at 565-566 (reaching same conclusion with regard to searches of newspaper offices pursuant to warrant); *see also New York v. P.J. Video, Inc.*, 475 U.S. 868 (1986) (probable cause standard for search warrant provides adequate protection of First Amendment rights of video store owner). Obviously, the government need make no heightened showing where there is no threat to First Amendment rights. *See Herbert v. Lando*, 441 U.S. 153, 173 (1979) (concluding that "constitutional values will not be threatened" by discovery of journalists' state of mind and editorial process in defamation action); *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. at 193 (press is not immune from labor law that "ends in no restraint upon expression or in any other evil outlawed by [the First Amendment's] terms and purposes"); *Associated Press v. NLRB*, 301 U.S. 103, 132 (1937) (same).

B. There Are Numerous Ways in Which a Subpoena Issued in Connection With a Grand Jury's Investigation of Possible Violations of Obscenity Laws Could Abridge the Recipient's First Amendment Rights.

1. *Subpoenas of Expressive Materials.*

Demands for production of specified sexually oriented expressive materials, without a prior finding that they are (or are likely to be) obscene, raise substantial First Amendment concerns. As the court of appeals concluded below:

> Indiscriminate grand jury subpoenas of protected films could easily convey the impression that erotic or sensual depictions of any sort—including those that are not obscene—open their possessor to criminal prosecution. The fact that a particular film has been subject to subpoena may itself inhibit its display and distribution. The chilling effect of such sweeping and indiscriminate uses of the subpoena power is anything but fanciful; it is altogether real.

884 F.2d at 778.

Grand jury subpoenas are concededly directed toward determining whether a criminal offense has been committed; the grand jury's object is to decide whether, and against whom, an indictment should issue. Thus the threat of prosecution is inherent in the subpoena's issuance, particularly when, as here, the subpoena is obviously directed to the target of the grand jury investigation. A subpoena that demands production of specific expressive materials "puts the distributor and everyone in the community on notice that if they continue to sell such matter, they will be investigated and prosecuted." *In re Grand Jury Subpoena: Subpoena Duces Tecum*, 829

F.2d 1291 at 1304 (Wilkenson, J., concurring). As this Court has recognized, because First Amendment freedoms are "delicate and vulnerable," a "threat of sanctions may deter their exercise almost as potently as the actual application of sanctions." *NAACP v. Button*, 371 U.S. 415, 433 (1963).

The line between protected sexually explicit speech and unlawful obscenity is "finely drawn," *Marcus v. Search Warrant of Property*, 367 U.S. at 731, and obscenity is essentially a strict liability offense, *Hamling v. United States*, 418 U.S. at 120-123. If distributors are subjected to subpoenas, indiscriminately directed at specific sexually explicit materials, they will " 'steer far wider' " of the line, inevitably causing the suppression of constitutionally protected speech. *New York Times Co. v. Sullivan*, 376 U.S. 254, 279 (1964), quoting *Speiser v. Randall*, 357 U.S. 513, 526 (1958). "[I]ndirect 'discouragements' undoubtedly have the same coercive effect upon the exercise of First Amendment rights as imprisonment, fines, injunctions or taxes." *American Communication Ass'n v. Douds*, 339 U.S. 382, 402 (1950). Government-compelled self-censorship—chilling the distribution of presumptively protected expressive materials—impermissibly "suppress[es] First Amendment liberties." *Kolender v. Lawson*, 461 U.S. 352, 358 (1983). The fact that the "practical effect may be to discourage protected speech is sufficient to characterize [it] as an infringement on First Amendment activities." *FEC v. Massachusetts Citizens for Life*, 107 S. Ct. 616, 626 (1986). *See, e.g., Hustler Magazine v. Falwell*, 108 S. Ct. 876, 880 (1988).[22]

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[22] The constitutional infirmity is exacerbated by the fact that the chilling effect not only causes the distributor to curtail his own First Amendment rights, but also results in the curtailment of the First Amendment rights of producers of expressive materials the subpoena recipient would otherwise have distributed. Although "[t]here is no specific constitutional inhibition against making the distributors of *food* the strictest censors of their merchandise, . . . the constitutional guarantees of the freedom of speech and of the press stand in the way of imposing a similar requirement on the *bookseller*." *Smith v. California*, 361 U.S. at 152-153 (emphasis added).

In an area where "[t]he separation of legitimate from illegitimate speech calls for . . . sensitive tools," *Speiser v. Randall*, 357 U.S. at 525, a grand jury subpoena directed at specific sexually explicit materials must be utilized only where the government's compelling interest necessitates this investigative technique.

2. *Subpoenas of Materials That Relate to Expressive Activities.*

Grand jury subopenas requesting production of the corporate records of businesses engaged in expressive activities may also abridge First Amendment rights.[23] This Court has repeatedly recognized that compelled production of business records may implicate First Amendment rights. *See, e.g., Fisher v. United States*, 425 U.S. 391, 401 (1976) (private financial information sought through IRS summons may receive First Amendment protection); *United States v. Miller*, 425 U.S. 435, 444 n.6 (1976) (First Amendment rights may be implicated by the summons of bank records); *NAACP v. Alabama*, 357 U.S. 449 (1958) (compelled production of organization's membership lists threatens First Amendment right to free association); *Roberts v. Pollard*, 393 U.S. 14 (1968) (*per curiam*), *summarily affirming* 283 F. Supp. 248 (E.D. Ark.) (three-judge court) (enforcement of a subpoena duces tecum requiring production of bank records would violate free association rights).[24]

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[23] Petitioner's argument that "[t]he First Amendment does not ordinarily protect routine corporate business records," Pet. Br. at 28, is beside the point. The question is not whether the documents themselves are constitutionally protected; the issue is whether enforcement of the subpoena requesting the documents infringes upon respondents' constitutionally protected expressive activities.

[24] *See also, e.g., In re Grand Jury Subpoena to First Nat'l Bank, Englewood, Colo.*, 701 F.2d 115 (10th Cir. 1983) (grand jury sub-

Subpoenas directed at business records that relate directly to specified expressive materials suspected of constituting obscenity could obviously have an impermissible chilling effect on the exercise of the recipient's First Amendment rights. Such a subpoena is not different, in effect, from one demanding production of the specific expressive materials themselves. Implicit in a subpoena to produce all records relating to the purchase or sale of a particular videotape, for example,[25] is a threat of prose-

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poena of bank records of antitax organization would impermissibly chill First Amendment right to free association).

The cases cited by petitioner are not to the contrary. *See* Pet. Br. at 28 n.22. In three of the four cases, the court found, *on the facts before it*, that the recipient of the subpoena or summons had not demonstrated that compelled production of its corporate documents would likely abridge its First Amendment rights. *See United States v. Coates*, 692 F.2d 629, 633 (9th Cir. 1982) (holding that IRS "examination of [church's] corporate minute books for purpose of reviewing whether a church qualifies for tax exempt status does not result in 'excessive entanglement' "); *United States v. Grayson*, 656 F.2d 1070 (5th Cir. 1981) (concluding that church had produced no evidence that IRS administrative summons of its bank records would chill its congregation's free exercise rights), *cert. denied*, 455 U.S. 920 (1982); *United States v. Freedom Church*, 613 F.2d 316 (1st Cir. 1979) (holding that IRS request for church records to assess tax exempt status does not constitute impermissible entanglement and church had made no showing that disclosure would pose actual or potential prejudice to right of congregants to freedom of association). In the fourth case, the court concluded that there was no First Amendment right involved at all. *See In re A Witness Before the Special October 1981 Grand Jury (Manner)*, 722 F.2d 349, 353 (7th Cir. 1983) (finding no right of association implicated in relationship between physician and patients).

[25] The subpoena issued to *amicus* by a grand jury sitting in the Western District of Kentucky demands production of all records concerning the acquisition of 10 named videotapes and 9 named magazines, "including but not limited to, contracts, memoranda, invoices, purchase orders, telegrams, telexes, letters, returned checks, money orders, bills of lading, accounting records including computer information" and "[c]opies of all catalogs and brochures regarding the sale and distribution of [those specified] material[s]." The

cution of that videotape which could cause a prudent distributor to cease distribution of that expressive material, even if he believes it is constitutionally protected. *Cf. Bantam Books, Inc. v. Sullivan*, 372 U.S. at 68 ("People do not lightly disregard public officers' thinly veiled threats to institute criminal proceedings against them if they do not come around."). Petitioner implicitly acknowledges that if compelled compliance with the subpoenas at issue here would chill respondents' exercise of free expression, the First Amendment would be violated. *See* Pet. Br. at 28.

3. *Subpoenas of Business Records.*

Even if the subpoena recipient is not chilled by the express or implicit threat of prosecution, grand jury subpoenas of business records may effectively abridge the exercise of First Amendment rights. If a subpoena for corporate documents is so broad and all-encompassing as to impinge significantly upon the recipient's practical ability to engage in expressive activities, the First Amendment prohibition against prior restraints would be implicated. *Cf. Roaden v. Kentucky*, 413 U.S. 496 (1973) (state may not close theater by warrantless seizure of film). This Court recognized in *Zurcher v. Stanford Daily*, 436 U.S. at 566, that a search of newspaper offices that "actually interfere[s] with the timely publication of a newspaper" would constitute an impermissible "restraint" on the newspaper's constitutional right to communicate, even if the newspaper did not fear prosecution. Clearly, the First Amendment prohibits grand jury subpoenas that have the same effect.

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subpoena also demands production of "all records" reflecting information about professionals who reviewed and/or rendered opinions about the 10 videotapes and 9 magazines, including documentation reflecting their opinions.

For these reasons, once a subpoena recipient makes a prima facie showing that enforcement of the subpoena would likely infringe its First Amendment rights in one of these ways, the burden shifts to the government to demonstrate that the infringement is necessary to further a compelling governmental interest and there is a substantial relationship between the information sought and a legitimate governmental goal.

C. Because the Court of Appeals Did Not Address Issues Necessary to Analyze Respondents' First Amendment Challenge, Remand Is the Proper Course.

The initial step in this inquiry is to determine whether respondents' First Amendment rights are implicated by the grand jury subpoenas. Respondents argued below and before this Court that the compelled production of their corporate documents to the grand jury would infringe their First Amendment rights. But because the court of appeals did not find it necessary to reach respondents' First Amendment challenge to this aspect of the subpoenas, the court did not address the likelihood that enforcement would abridge respondents' constitutional rights. Thus, the record on appeal is devoid of the court's judgment whether respondents have made a sufficient showing that their First Amendment rights would be abridged to shift the burden of justifying the subpoenas to the government. In the absence of such a finding, this Court should not address respondents' First Amendment challenge in the first instance. Remand is the proper course. *See, e.g., United States v. United Continental Tuna Corp.*, 425 U.S. 164, 182 (1976) (remanding to consider issue not addressed by the court of appeals); *California v. Taylor*, 353 U.S. 553, 557 n.2 (1957) (Court does not ordinarily consider questions not specifically passed upon by the lower court).

CONCLUSION

The writ of certiorari should be dismissed as improvidently granted. In the alternative, the judgment of the Court of Appeals for the Fourth Circuit should be affirmed, or, at the very least, remanded for consideration of respondents' First Amendment claims.

Respectfully submitted,

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